IN THE

# Supreme Court of the United States

October Term, 1933

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No. 290

CHASE NATIONAL BANK OF THE CITY OF NEW YORK, SUCCESSOR TRUSTEE TO THE EQUITABLE TRUST COMPANY OF NEW YORK, N. Y.,

*Petitioner,*

*vs.*

THE CITY OF NORWALK, OHIO,

*Respondent.*

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**On Writ of Certiorari to United States Circuit Court of Appeals—Sixth Circuit**

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## BRIEF OF RESPONDENT

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G. RAY CRAIG, *Norwalk, Ohio,*
REX F. BRACY, *Norwalk, Ohio,*
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*Petitioner,*

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THE CITY OF NORWALK, OHIO,

*Respondent.*

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## BRIEF IN BEHALF OF RESPONDENT

---

### OPINIONS BELOW

As stated in petitioner's brief, the opinion of the District Court for the Northern District of Ohio, Western Division, is not officially reported and the opinion of the Circuit Court of Appeals for the Sixth Circuit is found in 63 Fed. (2nd) 911.

The respective decisions of the courts of Ohio directly involved in this litigation are styled and reported as follows:

*State ex rel. Martin vs. The Ohio Electric Power Co.*, 35 Ohio App. 481;
*Ohio Electric Power Co. vs. The State, ex rel. Martin*, 121 O. S. 235.

These opinions are set forth in full in Appendix B (*infra*, pp. 163 to 180).

## STATEMENT OF THE CASE

The statement of petitioner in its brief being so long and involved, respondent will only attempt to submit an outline statement of the facts disclosed by the Record, and that mainly for the purpose of correcting several inaccuracies and omissions in the statement contained in petitioner's brief.

1. 1890-1891—The Norwalk Incandescent Light Company, a partnership, organized. Council of the City of Norwalk granted 20-year franchise to partnership. Electrical system built and put into operation by partnership. (R. 51; R. 35; R. 36; R. 53.)

Important Facts:

(a) Norwalk Incandescent Light Company, a partnership, secured no rights under Ohio General Corporation Act. (R. 51.)

(b) Franchise Ordinance limited to 20 years expired October 7, 1910. (R. 35; R. 36.)

(c) Present electrical distribution system involved in this case erected under this 20-year franchise ordinance. (R. 64.)

2. 1891-1893—The Incandescent Light & Power Company, an Ohio corporation, organized. Secured transfer of electrical distribution system of partnership and 20-year franchise. (Ex. 3, R. 282; R. 54-62.)

Important Facts:

(a) There is no evidence that the Norwalk City Council had any knowledge of intention of partners to organize a corporation at the time of the granting of the 20-year franchise ordinance. Judge Suhr, the only witness testifying upon the subject, stated that he had no recollection on this point. (R. 61.)

3. 1893-1895—Electrical distribution system in Norwalk operated by J. W. Foster and F. H. Jones, assignees for the benefit of creditors of The Incandescent Light & Power Company. (Ex. 4, R. 285.)

4. May 7, 1895—Electrical system purchased and operated by George P. Jones and Mayme C. Foster, as individuals. (Ex. 71, R. 473; Ex. 5, R. 287.)

5. 1895-1903—Northern Electric Company, an Ohio corporation, organized. Secured transfer of electrical system from Jones and Foster and operated the same. (Ex. 6, R. 289; Ex. 7, R. 291.)

Important Facts:

(a) Entered into 10-year public lighting contract with respondent city July 16, 1895, providing as follows:

"In further consideration of the premises, said company further covenants and agrees with said city that for the purpose of furnishing power and generating electricity for said arc and incandescent lights, it will build and construct in said city and during said period of ten (10) years will continuously keep in operation a first class electric light plant; which shall con-

sist of a brick and stone building of sufficient size and convenient construction, with a brick smoke-stack, to be equipped during all of said period with all the modern appliances for furnishing and maintaining good, regular, continuous and satisfactory lighting service." (Ex. G, R. 535.)

(b) Northern Electric Company erected generating plant pursuant to such public lighting contract.

6. 1903-1924—Electrical system operated by The Cleveland and Southwestern Traction Company, The Cleveland, Southwestern & Columbus Railway Company, and The Cleveland, Southwestern Railway & Light Company. Public lighting contract of April 13, 1905. (Ex. 11, R. 309; Ex. 12, R. 313; Ex. 27, R. 370; Ex. H, R. 541.)

Important Facts:

(a) The Cleveland and Southwestern Traction Company entered into public lighting contract of April 13, 1905, with respondent city, providing in part as follows:

"Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its said lamps, wires, poles and apparatus, but in such use of said streets, alleys, and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon said use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this contract or prevent said contractor from carrying out the same, *and provided further that nothing herein contained shall permit said use or occupation of said*

*streets, alleys and other public places after the expiration of this contract, to-wit: August 31*, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns hereunder, or from revoking the grant of said rights for non-user or misuser thereof through failure of said contractor or assigns to furnish such street, commercial and residence lighting to the said city, and the residents and inhabitants thereof, or otherwise.

*"The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred."* (Ex. H, R. 548.) (Italics ours.)

The contract also provided that should the utility

"fail to supply all demand for electrical energy for commercial and residence lighting, * * * then and in either of such cases of failure as aforesaid the said contractor shall lose and forfeit all his rights acquired under this contract." (Ex. H, R. 548.)

(b) The Cleveland, Southwestern & Columbus Railway Company in 1914 requested a new franchise to operate the electrical system in the respondent city in an attempt to forestall erection of a municipal plant. (R. 135, 136, 137, 201, 202; Ex. 80, R. 503.)

(c) In 1916 the municipal plant was put into operation. This plant now supplies all public lighting and three-fourths of the current consumed for private and commercial purposes.

7. July 1, 1924—Ordinance of the City of Norwalk regulating the construction and maintenance of wires and pole lines conducting electrical energy enacted. (Ex. 38, R. 438.)

Important Facts:

(a) Ordinance does not purport to grant rights to any company to use streets but is merely police power ordinance.

(b) On the date of passage, wires coming within the provisions of the ordinance were maintained and operated by following companies:

The Norwalk Telephone Company,

The American Telephone & Telegraph Company,

The Ohio Bell Telephone Company,

The Cleveland and Southwestern Railway & Light Company,

The Western Union Telegraph Company,

The Lake Shore Electric Railway Company,

The Sandusky, Norwalk & Mansfield Electric Railway Company,

The New York Central Railway telegraph lines,

The Wheeling and Lake Erie Railway telegraph lines. (R. 178.)

8. 1924-1925—Ohio Electric Power Company organized. Mortgaged its properties. Thereafter secured title to electrical system in Norwalk and executed supplemental mortgage covering the same. (Ex. 21, R. 351; Ex 28, R. 391; Exs. 22 to 25, R. 355 to 363; Ex. 29, R. 379.)

Important Facts:

(a) Only bonds now outstanding are $2,248,500 First Mortgage Gold Bonds 5% Series due 1957, the first of which were issued June 20, 1927, which was after the filing of the *quo warranto* case in the Court of Appeals of Huron County against Ohio Electric Power Company. (Ex. 31, R. 425; Ex. 32, R 428; Ex. 83, R. 513.)

(b) The electrical distribution system now operated by Ohio Electric Power Company in respondent city is the same physical property that was erected by The Norwalk Incandescent Light Company in 1890 under the 20-year franchise ordinance of that year, with minor additions and replacements. Its title thereto was secured from Victor Emanuel, an individual. (R. 64, Exs. 22 to 25; R. 355 to 363.)

9. 1926-1929—State of Ohio ex rel. E. G. Martin, Prosecuting Attorney of Huron County, vs. Ohio Electric Power Company, the *quo warranto* case against petitioner's mortgagor filed. Judgment of ouster entered by Court of Appeals of Huron County, Ohio, affirmed by Supreme Court of Ohio.

Important Facts:

(a) *Quo warranto* case was brought by the State of Ohio on the relation of the prosecuting attorney of Huron County, Ohio, and not by respondent herein.

(b) Respondent herein agreed to maintain and did maintain *status quo* with reference to property of petitioner's mortgagor from 1926 until decision of quo warranto case. (R. 104.) The removal of poles belonging to a telephone company by a city employe because they constituted a menace to life and property was not violation of this agreement but was immediately stopped when employee's superior and the city solicitor learned of the act. (R. 148-150; Ex. 62, R. 466; R. 146-147.)

(c) Decisions of the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in this *quo warranto* case, construing the statutes relative to easements for electrical distribution, are *contra* to the position herein asserted by petitioner.

*State ex rel. Martin vs. The Ohio Electric Power Co.*, 35 Ohio App. 481, May 21, 1928.

*Ohio Electric Power Co. vs. The State ex rel. Martin*, 121 O. S. 235, June 12, 1929.

(For opinions see Appendix B, *Infra*, pp. 163 to 180.

10. 1930-1933—Present litigation.

Important Facts:

(a) Alleged statements of G. Ray Craig to E. F. Boxell relative to Mr. Craig's attitude towards present litigation made while Mr. Craig had not yet been employed to represent respondent in this action. (R. 109, 115.)

(b) District Court entered injunction decree in following language:

"It is, therefore, ordered, adjudged and decreed that as long as The Chase National Bank of the City of New York, plaintiff, or its successors in trust, or the holders of bonds heretofore issued secured by the mortgage and the supplemental mortgage thereto, described in the bill of complaint, or any person, firm or corporation claiming by, through or under them, or either of them, have as such any interest in the properties and franchises described in the bill of complaint and the several amendments and supplements thereto herein, and as long as any holders of mortgages or bonds executed and delivered in payment of or substitution for, or in refunding or extension of said mortgage and supplemental mortgage or of bonds heretofore issued thereunder shall have any interest in or lien upon said properties and franchises, the said defendant, City of Norwalk, Ohio,

its attorneys, officers, officials, agents, employes and representatives, *and all persons whomsoever to whom notice of this order shall come,* be, and they are severally and collectively hereby enjoined and restrained from in any manner interfering with or interrupting the full exercise of any and all of said franchise rights of the Ohio Electric Power Company as hereinbefore found and the continued operation of the existing plant and electrical distribution system of the Ohio Electric Power Company in the streets, alleys or other public places of the City of Norwalk, Ohio, and from taking any steps, or doing any act to dismantle, wreck or remove any part of said existing system from the streets, alleys and public places of said city, *and from taking any steps or action of any kind whatever to cause the enforcement or carrying out by the sheriff of Huron County, Ohio, or any of his deputies, or by any other officers of any of the courts in the State of Ohio of the judgment of ouster entered by the Court of Appeals of Huron County, Ohio, in the quo warranto action instituted therein in the name of the State of Ohio on the relation of Edgar G. Martin, prosecuting attorney of Huron County, State of Ohio, decided May* 21, 1928, *which judgment was affirmed by the Supreme Court of Ohio, on June* 12, 1929, *and from applying to any of the courts of the State of Ohio for any writ, process or order of any kind whatever for the purpose of enforcing and carrying out said judgment of ouster.*

Nothing in this decree shall be interpreted as a finding or decision of the court upon the question of the right of the Ohio Electric Power Company to extend its lines as they exist at the date hereof, the court not finding it necessary to decide that question at this time. The question is therefore reserved and not decided.

It is further considered and ordered that the plaintiff, The Chase National Bank of the City of New York, have and recover of and from the defendant, City of Norwalk, Ohio, its costs herein.

Jurisdiction of this cause is retained by this court for the purpose of taking all action necessary to make this decree fully effective and for the purpose of passing upon the questions reserved and not hereby decided, and either party may apply for further relief at the foot of this decree should occasion arise therefor.

To all of the foregoing the defendant hereby excepts." (R. 241, 242.) (Italics ours.)

(c) Circuit Court of Appeals of the Sixth Circuit reversed the District Court upon the ground that state court decree was the sole ground for the relief sought and that the record showed no circumstances justifying equitable interference with said decree. (R. 571-576.)

## ISSUES

The issues appear to be:

(1) Did the Circuit Court of Appeals err in holding that the record showed no circumstances justifying equitable interference with the state court *quo warranto* proceedings?

(2) Has petitioner any continuing right to have its mortgagor, Ohio Electric Power Company, occupy the streets of the respondent?

Respondent contends that both questions should be answered in the negative. The second issue is not reached unless the first issue is disposed of against the respondent.

## ARGUMENT

Sections I and II of petitioner's brief deal with the first issue and will be considered under Section I of this argument. Section II seems to us to be little more than a restatement of Section I.

Section IV of petitioner's brief deals with the second issue. While Section III purports to deal with the first issue, it seems to us to bear only upon the second issue. Therefore, Sections III and IV will be considered under Section II of this Argument.

## I

## CIRCUIT COURT OF APPEALS PROPERLY HELD THAT THE RECORD SHOWED NO CIRCUMSTANCES JUSTIFYING EQUITABLE INTERFERENCE WITH THE STATE COURT QUO WARRANTO PROCEEDINGS

### A. The District Court decree violates Judicial Code Section 265 (Title 28 U. S. C. A. Section 379.)

#### 1. The Relief Granted by the District Court Does Not Fall Within the Exceptions to the Prohibition Against Interference With State Court Proceedings by Federal Courts

Judicial Code Section 265 provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

The permanent injunction entered by the District Court (R. 240-242) enjoins "all persons whomsoever to whom notice of this order shall come," from taking any steps or action of any kind whatever to cause the enforcement or carrying out of the judgment of ouster

entered by the Court of Appeals of Huron County, Ohio, in *State of Ohio ex rel. Martin vs. Ohio Electric Power Company,* by any of the officers of any of the courts in the State of Ohio. The injunction so granted is in direct violation of the provisions of Section 265 Judicial Code, in so far as it enjoins the Court of Appeals of Huron County, Ohio, itself, from taking any action whatsoever in the *quo warranto* case. The injunction in this regard does not fall within the class of cases where an injunction against enforcement of a judgment by a party to a suit in the state court is allowed, since, as we will point out, the parties to the suit in the state court are not before this court.

In continuing to operate in the streets, alleys, and public places of the City of Norwalk, the Ohio Electric Power Company is now in contempt of the Court of Appeals of Huron County, Ohio; and that court, but for the injunction granted by the District Court in the present case, can properly, of its own motion, cite the Ohio Electric Power Company and its officers for contempt. An injunction against such action by the Court of Appeals of Huron County certainly constitutes a stay of proceedings in a state court and is beyond the power of the District Court. Neither the Court of Appeals of Huron County nor the county prosecutor of Huron County nor the State of Ohio is a party to the present litigation.

In *Wells Fargo & Co. vs. Taylor,* 254 U. S. 175, the different types of cases in which federal courts may enjoin state court proceedings are in substance classified as follows: (1) the enforcement of local statutes which are repugnant to the Constitution of the United States, or (2) proceedings defeating or impairing the jurisdic-

tion of the federal courts, or (3) granting a party relief from a judgment under circumstances where its enforcement would be contrary to recognized principles of equity and standards of good conscience.

The present case does not fall within any of these three exceptions to the broad prohibition of the statute.

As the Circuit Court of Appeals pointed out, there has been no claim made that the judgment of the state court is void or that it was based upon fraud or mistake of fact.

It is not claimed that Ohio Electric Power Company did not have a fair trial in the state courts or that it did not have ample opportunity of fully presenting its case or that there was any suppression of evidence or that there was any inequitable or unconscionable conduct on the part of the respondent in the state court proceedings. The sole claim of the petitioner is that it has presented its claim that the twenty-year limitation was not a binding covenant upon a different theory than the same claim was presented by Ohio Electric Power Company in the *quo warranto* proceedings in the state courts. (See page 43 of petitioner's brief.)

In all of the cases cited by petitioner wherein a federal court enjoined the prevailing party in a state court from enforcing a judgment obtained in the state court, the judgment was void or voidable on some well recognized equitable ground. In the case at bar, the most that can be claimed is that the mortgagor's trustee has not been heard upon the merits of its mortgagor's claim that it (the mortgagor) has a perpetual franchise to occupy the streets, alleys and public places of the City of Norwalk.

The statement, at page 23 of petitioner's brief, that the "proceedings in the *quo warranto* action in the state court had long since terminated," is not correct, for it is apparent from the Record that the mandate of ouster granted by the State Court of Appeals had not been executed. So long as the writ of ouster remained unexecuted, the proceedings were still pending in the State Court of Appeals. The further statement, on page 23 of petitioner's brief, that inasmuch as petitioner was not a party to the *quo warranto* proceedings, the enforcement by the city of the judgment in *quo warranto* "would be just as unconscionable," as "if petitioner had been a party to the *quo warranto* proceeding and a judgment had been obtained against it by fraud, accident or mistake therein" is not warranted.

See *Bristow Battery Co. vs. Board of Commissioners,* 37 Fed. (2d) 504, *certiorari* denied 282 U. S. 843.

This case will be referred to at length in a subsequent part of this brief. (*Infra,* pp. 16 to 18.)

**2. The Decree of the District Court Is a Direct Interference With the Proceedings of the State Court**

Petitioner ignores the distinction between the interference with the enforcement of money judgments and interference with the enforcement of a valid order of ouster issued in a *quo warranto* action.

In *State ex rel. Martin vs. Ohio Electric Power Co., supra,* the Court of Appeals of Huron County, Ohio, issued an order of ouster against the defendant. This order was issued under Section 12317 of the General Code of Ohio, which reads as follows:

> "Sec. 12317. Judgment Where Office, Franchise, etc., Found to Have Been Usurped. When a defendant is found guilty of usurping, intruding into or unlawfully holding or exercising an office, franchise or privilege, judgment shall be rendered that he be ousted and altogether excluded therefrom, and that the relator recover his costs."

It is an order by the court to the defendant and its violation, as hereinbefore pointed out, is punishable by contempt proceedings.

See: *State vs. Cahill,* 131 Iowa 286, 108 N. W. 453; *People vs. Mortenson,* 224 Ill. App. 221 (1922).

In all the cases cited by petitioner, wherein a federal court enjoined the prevailing party in the state court from enforcing a judgment secured therein, the judgments were for money only. *Simon vs. Southern Ry. Co.,* 236 U. S. 115, is typical of cases relied upon by petitioner. In all these cases, the plaintiff in the state court merely changed his claim from an unadjudicated claim to an adjudicated claim; and in order to secure payment the judgment creditor was required either to cause a levy of execution to be made or to commence new proceedings in another court. As this court said, in the *Simon* case, when the plaintiff in the state court endeavors to use the judgment, which he has obtained, a new state of facts not within the language of the statute may arise which may warrant the federal court in an appropriate case to enjoin the enforcement of the judgment.

In the case of a judgment in *quo warranto,* the situation is materially different. The court orders the defendant to cease usurping the franchise and may enforce its order *sua sponte.* By an action in *quo warranto* the executive branch of the state government transfers to

the judicial branch the duty of vindicating the state and protecting its citizens against a usurper. No further action by the officer of the executive branch of the government bringing the suit is required to make the judgment effective. To prevent the enforcement of the order of ouster, the injunction of the federal court must operate upon the state court and its officers. A direct interference with proceedings in the state court is, therefore, involved.

Cf:

*Evans vs. Gorman,* 115 F. 399;
*Harrison et al. vs. Triplex Gold Mines, Ltd., et al.,* 33 F. (2d) 667, 672;
*Russell vs. Detrick,* 23 F. (2d) 175;
*Western Union Telegraph Co. vs. L. & N. R. Co.,* 218 F. 628.

While the District Court had jurisdiction of the parties and subject-matter of the litigation, it was clearly erroneous for it

> "to enjoin all persons to whom notice of the order of injunction should come from taking any steps or action of any kind to cause the enforcement of the judgment of ouster of the state court." (Opinion of Judge Moorman, R. 573.).

In *Bristow Battery Co. vs. Board of Commissioners, supra,* decided by the Circuit Court of Appeals, Tenth Circuit, it appears from the statement of Circuit Judge Lewis that the City of Drumright, in Creek County, Oklahoma, had issued $171,000.00 of funding bonds for the purpose of funding its outstanding indebtedness. In accordance with Oklahoma statutes, the city had obtained an order of a state court empowering it to fund its in-

debtedness. The bonds were approved and registered by the proper city and county officials and certified by the attorney general of the state, who is ex-officio bond commissioner, such certificate being attached to each bond. The bonds were regularly and legally issued. Four taxpayers of the city commenced an action in the Creek County District Court against the county treasurer in which they challenged the validity of the tax levy to pay the interest on said bonds and provide a sinking fund for the redemption thereof, on the ground that the bonds exceeded the constitutional debt limit of the city. The district court adjudged that the bonds had been legally and duly issued and constituted valid outstanding obligations of the city. The judgment of the district court was reversed by the Supreme Court of Oklahoma, which held that the bonds were void because in excess of the constitutional debt limit. Rogers County purchased in the open market for value $50,000 par value of these bonds in 1924, before the litigation in the state courts was commenced. Rogers County was not a party to either of the cases in the state courts, and it had no knowledge of the pendency of those cases. Prior to the time Rogers County had purchased the bonds, the Oklahoma Supreme Court had held in a number of decisions that the holders of municipal securities issued by the various municipalities in the state were necessary and proper parties to any action involving the legality of bonds so issued, and that the issuance of funding bonds issued concurrently with the cancellation of indebtedness of a municipality did not increase the indebtedness of such municipality, but merely changed the form thereof.

The Circuit Court of Appeals held, in substance, that a judgment entered by the State Supreme Court in a suit

by taxpayers, in which a holder of municipal bonds was not joined decreeing that the bonds were void because in excess of the constitutional debt limit of the city, although not binding on the holder of the bonds, did not give him a right to obtain a restraining order in a federal court to prevent the enforcement of the state court's judgment upon the ground that the provisions of Amendment 14 of the Federal Constitution were violated, and that even though the decision of the state court was erroneous the holder of the bonds was not deprived of his property without due process of law within the constitutional provision so as to give the federal court jurisdiction to interfere. Circuit Judge Cotteral dissented in that case, but, as stated, *certiorari* was denied by this court.

The Circuit Court of Appeals also held in the *Bristow Battery Company* case that the decision of a state court upon a question of law, however wrong or contrary to previous decisions, is not an infraction of the 14th Amendment to the Federal Constitution merely because it is wrong or because earlier decisions are reversed.

In *Russell vs. Detrick, supra,* it appeared that a suit had been instituted in a state court for the cancellation of certain securities of the value of $115,000.00 held by a state insurance commissioner as security for the payment of insurance policies issued to various parties. Detrick, the insurance commissioner, filed his bill in equity in the United States District Court and was granted an injunction by that court restraining the prosecution of the suit in the state court. Adverting to Section 265 of the Judicial Code, Circuit Judge Gilbert, at page 178, used the following language:

> "But the present case does not belong in the class of any of the recognized exceptions. It is an injunction against the plaintiffs in a state court, enjoining them against taking further steps in the prosecution of suits to cancel securities, and it is issued on behalf of plaintiffs in a federal court, not parties to the suits in the state court, to defeat cancellation of the securities and protect their own interest therein. We think the injunction comes clearly within the prohibition of Section 265."

The holding of this Court in *Essanay Film Mfg. Co. vs. Kane* (1922), 258 U. S. 358, cited at page 24 of petitioner's brief, is directly against their contention that the decision of the Circuit Court of Appeals was erroneous. This court there held, in substance, that a suit in a federal court to enjoin the further prosecution of an action *in personam*, still pending in a state court, on the ground that the attempted service of process upon defendant was lacking in due process of law, is forbidden by the provisions of the Judicial Code, § 265, that, except in bankruptcy proceedings, a federal court shall not "stay proceedings in any court of a state," and that the defendant's remedies are either a direct review in the Federal Supreme Court of the final judgment of the state court of last resort, or a collateral attack upon the judgment. Mr. Justice Pitney, who delivered the opinion of the court, expressed himself as follows: (p. 361):

> "At the same time, since 1793, the prohibition of the use of injunction from a federal court to stay proceedings in a state court has been maintained continuously, and has been consistently upheld. *Hull vs. Burr*, 234 U. S. 712, 723, 58 L. Ed. 1557, 1563, 34 Sup. Ct. Rep. 892, and cases cited. In exceptional instances the letter has been departed from while the spirit of the prohibition has been observed; for example, in cases holding that,

> in order to maintain the jurisdiction of a federal court, properly invoked, and render its judgments and decrees effectual, proceedings in a state court which would defeat or impair such jurisdiction may be enjoined."

In every case cited by petitioner in its brief, to the effect that the enforcement of a void judgment, where the proper jurisdictional grounds exist, may be enjoined in a federal court, the judgment was either tainted with fraud or obtained under mistake of fact and the judgment challenged not by a third party, but by the judgment debtor himself and, as stated, the judgments in that class of cases were for money only.

*Louisville Trust Co. vs. City of Cincinnati,* 76 F. 296, is the only case we have found which discusses the power of a federal court to enjoin at the instance of a mortgagee, the enforcement of a judgment of ouster in *quo warranto* against a mortgagor utility issued by a state court, in view of Judicial Code Section 265. The *Simon* case and the other money judgment cases relied upon by petitioner are not inconsistent with the statement, in the *Louisville Trust Co.* case, of Mr. Justice Lurton, then a circuit judge, that such an injunction constitutes a violation of Section 265 of the Judicial Code, and that the court could not enjoin the enforcement of a writ of ouster in *quo warranto* or proceedings to secure enforcement of such writ. We recognize that such an injunction was not involved in that case. In the *Louisville Trust Co.* case, the injunctional order only restrained the defendant "from taking into its own hands the enforcement of the decree of the state court." The court also pointed out, in substance, that it would be improper to enjoin the defendant from applying for any writ which

the state court might lawfully issue or to prevent the execution of such writ "although its execution might be destructive of the interests of the complainant."

**3. By Reason of the Nature of an Action in Quo Warranto the City Was Not and Could Not Be a Party to the Quo Warranto Proceedings. This Action Is Brought Against Respondent City to Evade the Provisions of the 11th Amendment Prohibiting Suit Against the State of Ohio.**

The respondent was not a party to the *quo warranto* case and has no standing to secure enforcement of the order rendered therein. It is, therefore, clear that the injunction granted by the District Court in the case at bar can have no effect, unless it acts upon the Court of Appeals of Huron County itself and upon the State of Ohio, which was the moving party in the *quo warranto* litigation. This action constitutes an attempt to secure by indirection what can not be secured directly by reason of the prohibition against suits against the State of Ohio contained in the 11th Amendment to the Constitution of the United States and the prohibition against injunction with reference to state court proceedings contained in Section 265 of the Judicial Code.

Petitioner contends that the State of Ohio has no interest in the occupation of the streets of respondent by Ohio Electric Power Company and that respondent must be regarded as the real party in interest in the *quo warranto* litigation. This contention is inconsistent with the theory upon which petitioner bases its whole case; viz.: that all rights of public utilities who occupy the streets

of municipal corporations in Ohio come directly or indirectly from the state.

A consideration of the authorities in Ohio and elsewhere shows that the fact that *quo warranto* proceedings are brought by the state in its sovereign capacity is not a mere matter of form, but is of the essence of the proceeding. The *quo warranto* proceedings here under consideration were brought under Sections 12303 *et seq.* of the General Code of Ohio. Such an action is brought by the State of Ohio to protect the public (which includes the citizens of the City of Norwalk) from unauthorized, illegal usurpation; it is public and not personal in nature, regardless of the person who furnishes the information upon which the action is based.

*State ex rel. vs. Maccabees,* 109 O. S. 454 (1924);
*State vs. Conservancy District,* 100 O. S. 483;
*People vs. Milk Producers Ass'n,* 60 Cal. App. 439, 212 P. 957;
*Anderson vs. Myers,* 67 A. 1036 (N. J.);
*State ex rel. Clare vs. Consolidated School District,* 277 Mo. 458, 209 S. W. 938.

In *Hardin-Wyandot Co. vs. Upper Sandusky,* 93 O. S. 428 the Court of Appeals of Wyandot County, Ohio, held that a municipal corporation of Ohio could not bring an action to secure the removal of an electrical distribution system from its streets, and that the State of Ohio alone could bring such action.

See also:

*Fredonia vs. Fredonia Natural Gas Light Co.,* 169 App. Div. 690, 155 N. Y. S. 212.

Likewise, such an action cannot be brought by a private individual.

*13th Street Railroad Co. vs. Broad Street Railroad Co.*, 219 Pa. 10, 67 A. 901.

That the City of Norwalk could not be the real party in interest in the *quo warranto* suit is shown by the fact that under the laws of Ohio, full control of *quo warranto* proceedings, subject to the control of the court, is in the law enforcement officer of the state bringing the proceedings. The person who may furnish information to such public officer as a basis for such proceedings can not determine the course thereof. The bringing of such an action is discretionary with the public official.

*Thompson vs. Watson*, 48 O. S. 552;
*State ex rel. vs. Craig*, 21 O. C. C. 175;
See *Toledo Traction Co. vs. Smith*, 205 F. 643, 662.

The essence of the *quo warranto* action was an action by the State of Ohio against the Ohio Electric Power Company; and this court should look through the form of petitioner's cause of action to the substance thereof and recognize that the present action is one to enjoin the State of Ohio and the courts thereof from proceeding further in the *quo warranto* litigation. When the present case is so analyzed, it becomes apparent that the State of Ohio is a necessary party in order to secure the relief which the petitioner is really seeking; and the state not having given its consent to be sued, the present action should be dismissed as an attempt to secure, by indirection, jurisdiction over the state in violation of the

Eleventh Amendment to the Constitution of the United States.

Unless the District Court decree acts directly upon the Court of Appeals of Huron County, Ohio, and the State of Ohio, it can have no effect upon the *quo warranto* proceedings or the enforcement of ouster therein and is, therefore, nugatory. It should not be sustained unless some ground of jurisdiction other than the possible enforcement of the order of ouster is shown. We shall discuss such other possible grounds in the next section of this brief.

**B. Petitioner Fails to Show That It Will Suffer Irreparable Injury by Forceful, Violent or Unlawful Action of Respondent City and, Therefore, Is Not Entitled to Equitable Relief.**

Petitioner bases its claim that this case is a proper one for the exercise of equitable jurisdiction upon (a) the passage of the resolution of March 23, 1926, requesting Ohio Electric Power Company to remove its equipment from the streets of the City (Petitioner's Exhibit 42, R. 445); and the passage of the resolution of May 18, 1926, requesting the Prosecuting Attorney of Huron County, Ohio, to institute *quo warranto* proceedings against Ohio Electric Power Company (Petitioner's Exhibit 45, R. 449); (b) the action of the superintendent of light and power of the City of Norwalk in removing ten telephone company poles having contacts with wires of Ohio Electric Power Company from Main Street in the City of Norwalk (Amendment and Supplement to Bill of Complaint, § 2, R. 17); and (c) the statement of

one of the attorneys connected with the *quo warranto* proceeding that he had no authority to extend any more favors to Ohio Electric Power Company and that the removal of the lines and equipment of Ohio Electric Power Company would be carried out under the order of ouster entered by the Court of Appeals of Huron County in the *quo warranto* proceeding.

Respondent contends that none of these alleged grounds is a sufficient basis for equitable relief.

**1. The Resolutions of the Municipal Council of March 23, 1926, and May 18, 1926, Do Not Furnish Any Basis for Equitable Relief.**

The resolutions of the council of the City of Norwalk, of March 23, 1926, and May 18, 1926 (Petitioner's Exhibits 42 and 45, R. 445, 449), do not constitute laws impairing the obligation of contract. They show an intent upon the part of the city to follow the orderly processes of litigation to determine the rights of Ohio Electric Power Company. There was no threat contained in the resolutions to remove the property of the company by force. The city plainly followed the procedure which was approved by this court in *Des Moines vs. City Railway Co.*, 214 U. S. 179. Under the authority of that case, the Petitioner must show affirmatively the intention of Respondent to interfere with the electrical distribution of Ohio Electric Power Company other than by orderly court action.

Petitioner indulges in a forced and strained misconstruction of the provisions of the city's resolution of March 23, 1926, to establish a ground for equitable juris-

diction. Petitioner characterizes this resolution to be an "ordinance." As a matter of fact, it is not an ordinance, but provided merely for the service of notice of the city on Ohio Electric Power Company that it was without any franchise, license or authority to use the city streets and requiring it within thirty days from the date of the service of the notice to take its property from the streets, alleys and other public places of the city. This so-called "ordinance" has entirely spent its force, in that it was only a step taken in the orderly process of the city as a prerequisite to a request to the County Prosecutor that he commence an action in *quo warranto*. Nothing remains to be done by Respondent City under the provisions of either of the resolutions in question. There was nothing of a general or permanent nature in either of these resolutions which, in any way or by any process of reasoning, can be said to come within the inhibition of Section 1 of the 14th Amendment to the United States Constitution.

The resolution of March 23, 1926, when served on Ohio Electric Power Company, was simply a notice to quit, such as a landlord would serve upon a tenant holding over after the expiration of his term. Such a notice carries no implication that force is to be used to evict such tenant.

The argument of counsel in support of their unique theory, indicated at the last mentioned pages of their brief, is not supported by any of the decisions therein cited.

A comparison of the municipal ordinance, which was before this court in *Cincinnati vs. Cincinnati Traction Co.*, 245 U. S. 446, with the resolutions here under dis-

cussion shows that the case is not in point. The Cincinnati ordinance imposed drastic regulations on the utility pending judicial determination of its rights. The decree therein as modified by this Court only enjoins enforcement of these regulations pending such judicial determination. The resolutions of the Norwalk City Council contain no analogous regulations.

*South Covington Ry. Co. vs. Newport,* 259 U. S. 97, is not inconsistent with the contention the Respondent is here urging, for the reason that it involves only the sufficiency of the bill of complaint. We claim that Petitioner failed to prove the allegations contained therein to the effect that Respondent City had threatened to interfere with the electrical distribution system of Ohio Electric Power Company by forceful, violent, or unlawful acts.

*St. Paul Gas & Light Company vs. St. Paul,* 181 U. S. 142, and *Ross vs. Oregon,* 227 U. S. 150, cited at page 49 of Petitioner's brief, support Respondent's position rather than that of Petitioner.

The two resolutions in question indicate that Respondent City was disposed to follow orderly processes of litigation to determine the rights of Ohio Electric Power Company in the streets and public places of the city. The passage of these resolutions is inconsistent with the unwarranted statements of Petitioner, in its brief, that the disposition of the city was to "proceed by force."

These resolutions taken as preliminary steps to apply to a court of the country for an adjudication of the

rights of the parties are not laws impairing the obligation of a contract.

See *Des Moines vs. Des Moines City Railroad Co., supra;*
*Defiance Water Co. vs. Defiance*, 191 U. S. 184.

Bearing in mind that the grant of the county commissioners in the *Northern Ohio Traction & Light Company* case, 245 U. S. 174, was unlimited, which appears to have been the turning point of the case in this Court, the attention of the Court is respectfully called to the language of Mr. Justice Clarke, in a dissenting opinion concurred in by Mr. Justice Brandeis, at page 592, as follows:

> "The power to declare laws of states unconstitutional and to reverse the judgments of the supreme courts of states is so fateful and is so unprecedented in the history of governments other than ours that, as this court has repeatedly declared, it should be exercised only in cases which are clear, and it is impossible for me to think that this is such a case."

## 2. There Was No Action or Threatened Action by Respondent Justifying Equitable Relief

The record in this case clearly shows that during the pendency of the *quo warranto* case, the city solicitor and counsel for Ohio Electric Power Company agreed that the *status quo* should be maintained until final hearing thereof. (R. 102, 103.) This action was taken although the city was not a party to the *quo warranto* litigation. It shows a continuing intention upon the part of the city not to resort to anything other than orderly court action.

Petitioner lays great stress upon the removal of nine or ten poles belonging to The Local Telephone Company, to which there were contacts with wires of Ohio Electric Power Company, by employees of the city. This action took place while the *quo warranto* case was before the state courts. It clearly appears that these poles were removed under the authority of the ordinance of July 1, 1924, as poles which had been abandoned by The Local Telephone Company. (R. 148, 150; Petitioner's Exhibit 62, R. 466.) These poles were in unsafe condition and were a menace to the lives and safety of the citizens of Norwalk. (R. 149, 150.) There was no cessation of service of Ohio Electric Power Company as a result of the removal of these poles, and the city did not interfere with the replacement of new poles in their place. (R. 127.)

As soon as responsible city officials had learned of the removal of the poles, the employees carrying on the work were ordered to desist. (R. 146.) No other action by anybody connected with the city in any way interfering with the operations of Ohio Electric Power Company appears in the record.

Such unauthorized action of employees of the Department of Light and Water concerning the poles of the Telephone Company and not the poles of Ohio Electric Power Company, and carried on in the interests of public safety and not under any claim of right to oust Ohio Electric Power Company from the streets of the city, cannot be considered as evidence of intention upon the part of the city forcibly and unlawfully to oust Ohio Electric Power Company from its streets.

Any statements by Mr. Craig, who was one of the counsel connected with the *quo warranto* proceedings, with respect to his attitude towards the present litigation cannot be urged by petitioner as proof of an intention upon the part of the respondent to use force or unlawful means to oust the Ohio Electric Power Company from the streets, since it is clear that at the time any such statements were made, Mr. Craig had not been employed to represent respondent in this litigation. (R. 109, 115.) Mr. Craig's statements are, therefore, no more binding upon the city than those made by any other citizen thereof. In addition, the statements of Mr. Craig, testified to by petitioner's witnesses, do not imply any intention upon his part or that of the respondent to take action against Ohio Electric Power Company other than through orderly judicial proceedings. The attitude of Mr. Craig upon this subject was one of unusual solicitude, lest any violent action be taken by anybody against Ohio Electric Power Company. (R. 105, 146, 147.)

The situation which has really brought about the present litigation is that there is now pending in the Court of Appeals of Huron County, Ohio, in the case of *State ex rel. Martin, Prosecuting Attorney of Huron County, Ohio, vs. The Ohio Electric Power Company,* an order of ouster against Ohio Electric Power Company. It is this order of ouster which really worries the petitioner and its mortgagor, and the other alleged grounds for equitable jurisdiction are, we submit, merely window dressing. The order of ouster was entered in an action brought by the State of Ohio. The City of Norwalk was not and could not be a party to the action. The possibility of the enforcement of such an order of ouster manifestly cannot be the basis of equitable relief as against the Respondent City.

## II

## PETITIONER HAS NO CONTINUING RIGHT TO HAVE ITS MORTGAGOR, OHIO ELECTRIC POWER COMPANY, OCCUPY THE STREETS OF RESPONDENT

### A. The Ordinance of October 7, 1890, was a valid contract limited in term to twenty years and is binding upon Petitioner's Mortgagor as the Successor of The Norwalk Incandescent Light Company.

The ordinance of the City of Norwalk of October 7, 1890 (Exhibit B attached to the Second Amendment and Supplement to the Bill of Complaint, R. 36), is in form a grant of easement or right of way to The Norwalk Incandescent Light Company, the partnership, and its successors and assigns, limited in term to twenty years from the date thereof. Respondent contends that it was in all respects a valid enactment and, having been accepted by The Norwalk Incandescent Light Company and its successors, constitutes, under the decisions of the Supreme Court of the United States and of the courts of Ohio, a valid and binding contract as to all of its provisions, including the term limitation. Respondent further contends that since the electrical distribution system of Ohio Electric Power Company was constructed and operated under the easement created by the ordinance which has now expired it is now operated without right and an injunction to protect such operation is improper.

## 1. The City Had the Power to Pass the Ordinance Under the Act of May 12, 1886

The city clearly had the power to pass the ordinance of October 7, 1890, under the provisions of the Act of May 12, 1886, 83 O. L. 143, which reads as follows:

"AN ACT

"To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, *with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe.* (Italics ours.) Provided, that all wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands,

lanes, squares and public places in such city, village or town.

"Section 3. This act shall take effect and be in force from and after its passage.

Passed May 12, 1886."

Petitioner contends that this act was repealed by implication by the Act of January 26, 1887, 84 O. L. 7, which is as follows:

"AN ACT

"To supplement sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

"'Sec. 3471a. The provisions of this chapter, so far *as the same may be applicable* (Italics ours), shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

"Section 2. This act shall take effect and be in force from and after its passage.

"Passed January 26, 1887."

It is obvious from a reading of the later act that there is no express repeal of the earlier act. The later act provided that the provisions of the General Incorporation Act of Ohio relating to magnetic telegraph companies should apply to electric light companies, so far as the

same should be "applicable." The earlier act was not enacted as part of the General Corporation Act.

It is a well established rule of statutory construction that a general statute will not be considered as repealing an earlier particular statute by inference, unless obviously inconsistent therewith.

*Memphis vs. Postal Telegraph & Cable Co.*, 145 F. 602 (C. C. A. 6th, 1906).
*Guthrie vs. Sparks*, 131 F. 443 (C. C. A. 6th, 1904).
*Fosdick vs. Perrysburg*, 14 O. S. 472, 485 (1863).

There is no obvious inconsistency between the two acts. It is enough for present purposes to point out that the later act may be interpreted as relating only to corporations, while the earlier act continued in force insofar as it affected unincorporated companies.

On April 22, 1896, the Legislature of Ohio indicated that it regarded the Act of May 12, 1886, as still in effect when it amended Section 2 of the Act without amending or repealing Section 1 thereof (Act of April 22, 1896, 92 O. L. 290). The Act of May 12, 1886, was repealed October 22, 1902 (96 O. L. 20, 102), which is further evidence that the legislature still regarded it as unrepealed by the Act of January 21, 1887.

In *Hardin-Wyandot Lighting Co. vc. Upper Sandusky*, 93 O. S. 428, 439 (1916), Judge Johnson discusses the relation between the Act of May 12, 1886, and the Act of January 26, 1887, in the following language:

> "This act did not repeal the Act of May 12, 1886, *supra,* in express terms, but when the two acts are contrued together it is clear that it was the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' * * *"

Judge Johnson does not state that the later act repealed the earlier one and his statement cannot be so construed when we consider that the later act did not cover unincorporated companies. It is further to be noted that Judge Johnson's statement is clearly *obiter,* for the Supreme Court of Ohio affirmed the judgment of the Court of Appeals against the Hardin-Wyandot Lighting Company upon the ground that the company had violated the provisions of a *municipal franchise ordinance.* The ordinance was held to be a valid and binding contract as against the lighting company. Whether the ordinance was adopted under the Act of May 12, 1886, or under the Act of January 26, 1887, was of no importance to the decision of that case, as we shall have occasion to point out at greater length. (*Infra,* pp. 81 to 88.)

Respondent's position that the Act of January 26, 1887, did not repeal the Act of May 12, 1886, either expressly or by implication, is strengthened by the following language in the opinion of Judge Allen in *Ohio Public Service Co. vs. State of Ohio ex rel. Fritz,* 113 O. S. 325, 332:

> "The syllabus"—[of *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandnsky,* 93 O. S. 428] "did not state that the statute of 83 Ohio Laws 143, was repealed by implication, and in the judgment of the writer of this opinion such was not

the effect of the enactment of Section 9192, General Code, with its proviso that the provisions of the chapter should apply to electric light and power companies 'so far as applicable'."

(The foregoing statement of Judge Allen is also *obiter*.)

**2. The City Had Power to Enact the Ordinance of October 7, 1890, Under Its General Powers Over Its Streets**

Even in the absence of the Act of May 12, 1886, the City of Norwalk had full power to make the grant contained in the ordinance of October 7, 1890. Under the statutes in force at the time the franchise was granted to the partnership in 1890, the city had the general power to lay out, establish, open, widen, narrow, straighten, extend, keep in order and repair, and to light its streets, alleys, and public grounds, etc. (*Ohio R. S.* 1890, *Sec.* 1692.) It likewise had the power to appropriate, enter upon, and hold real estate within its corporate limits for the purpose of widening, narrowing, or straightening its streets, alleys, and public grounds, and for lighting for any public use. (*Ohio R. S.* 1890, *Sec.* 2232.) General power of control over the streets was given to the city council. (*Ohio R. S.* 1890, *Sec.* 2640.)

The city had the further power to regulate from time to time the price which any electric light company might charge for public or private electric light service and such electric light company could in no event charge more for such service than the price specified by the ordinance; and the city further had the power to regulate and fix the price which such company might charge for

rent of its meters. (*Ohio R. S.* 1890, *Sec.* 2478.) The city could also by contract or otherwise provide for the lighting of its streets. (*Ohio R. S.* 1890, *Secs.* 2491, 2492.)

(The statutes cited in the last two preceding paragraphs are quoted in Appendix A, *infra.*)

Under the law of Ohio, a municipal corporation has title in fee simple to its streets, alleys, and public places, which title is held in trust for the benefit of the public.

The case of *Kinsman Street Railroad Co. vs. Broadway, etc., R. R. Co. et al.*, 36 O. S. 239, supports respondent's position that the city had power to adopt the ordinance of October 7, 1890, under its general powers over its streets. The Supreme Court of Ohio held in that case that a municipal corporation can provide for the establishment of street railways under its general powers of regulation and control of its streets. At page 250, the court says:

> "The power to regulate and control the public streets of the city is lodged in the municipal authorities. The object in conferring this power, and its exercise by the city council, are, and should be, to conserve the public welfare and convenience. One of the modes of promoting this welfare and convenience is through the establishment of street railroads. * * *"

With equal conviction, it may be stated that the power to establish electric lighting systems is conferred upon cities and villages.

See also

*Hattersley vs. Waterville*, 26 O. C. C. 226.

*Pike's Peak Power Co. vs. Colorado Springs*, 105 F. 1 (C. C. A. 8th, 1900).

In *Columbus Telephone Co. vs. Columbus,* 88 O. S. 466 (1913), the Supreme Court of Ohio held that under its general powers over streets, a municipal corporation could enact a franchise ordinance granting a telephone company the right to use its streets upon the payment of a percentage of the company's gross receipts. The court further held that by acceptance of the franchise grant and operation thereunder, the telephone company became estopped to assert the invalidity of the ordinance.

In *Columbus vs. Public Utilities Commission,* 103 O. S. 79, Judge Wanamaker, in his concurring opinion at page 130, goes even further when he says that by incorporation a municipal corporation receives the power to enter into contracts of the nature of the ordinance of October 7, 1890. He bases his opinion on *Cass vs. Dillon,* 2 O. S. 607.

Petitioner's counsel contend that *Brush Electric Light Co. vs. Jones Bros. Co.,* 5 O. C. C. 340, is authority that in the absence of the express grant of power contained in the Act of May 12, 1886, a municipality could not grant the right to use its streets, alleys, and public places for the erection of electric lighting equipment. We submit that the question before the court in that case was the validity of certain orders of the municipality requiring the joint use of poles. The court expressly upheld such orders, and any discussion in the case of the powers of municipalities prior to May 12, 1886, is *obiter.*

### 3. The Supreme Court of the United States Has Uniformly Upheld the Validity of Franchise Ordinances Such as the Ordinance of October 7, 1890.

Petitioner contends that the decision in this case is to be determined by the interpretations of the law of Ohio as found in the opinions of the Supreme Court of the United States insofar as there is any conflict between the decisions of that court and the decisions of the state courts in Ohio. We do not admit that any such conflict exists as to the questions involved in the present case. The Supreme Court of the United States has uniformly upheld the validity of franchise ordinances passed by Ohio municipal corporations and has enforced the same as binding contracts upon all parties thereto.

In *Northern Ohio Traction Co. vs. Ohio*, 245 U. S. 574 (1918), the Supreme Court held that a resolution adopted by the county commissioners granting right of way for an electric railway *to an individual*, with no provisions limiting the term thereof, constituted a valid and binding contract as between the county and the successor of the individual, perpetual as to time.

In *Ohio Public Service Co. vs. State*, 274 U. S. 12, the State of Ohio, on the relation of the prosecuting attorney of Wayne County, Ohio, brought an action in *quo warranto* to oust The Ohio Public Service Company from the streets of the Village of Orrville. The defendant claimed that it had a perpetual franchise to operate in the streets of the village by virtue of a franchise ordinance adopted by the village in 1892, granting to a partnership a right of way in the streets, alleys, and public places of the village. The company also claimed that it

had a state granted franchise resulting from the incorporation of its predecessor in title between the years 1887 and 1896. *The prosecuting attorney claimed, as the petitioner claims in the present case, that a municipal corporation was in* 1892 *without power to grant a franchise to use its streets.* The Court of Appeals of Wayne County held that the franchise ordinance of 1892 constituted a valid and binding contract, and that by incorporation the predecessor in title of the defendant received at most the capacity to secure a right to occupy the streets of the defendant city. It further held that as the franchise ordinance contained no limitation of time, it was cancelable by either party at will, and granted an order of ouster. The decision was affirmed by the Supreme Court of Ohio in 113 O. S. 325.

The Supreme Court of the United States (Mr. Justice Holmes and Mr. Justice Brandeis dissenting) reversed the judgment of the state courts upon the ground that *the franchise ordinance of* 1892 was a valid and binding contract perpetual in term and that to hold, as was held by the Supreme Court of Ohio, that the Act of April 21, 1896, terminated the franchise or made it non-assignable, constituted impairment of the obligation of a contract. It is to be noted that although The Ohio Public Service Company strongly argued its alleged state franchise in the Supreme Court of the United States, the Supreme Court placed its decision upon the validity of the municipal franchise. This case is, therefore, authority for the proposition that a municipal ordinance of the nature of the ordinance of October 7, 1890, constitutes a binding contract.

*Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky,* 251 U. S. 173 (1919), upon which petitioner relies in this case, recognizes the validity of a municipal franchise ordinance of the nature of the ordinance of October 7, 1890. The reasoning of Mr. Justice Clarke, who rendered the opinion, shows clearly that he assumes the validity of such an ordinance.

See also:

*Cleveland vs. Cleveland City Ry. Co.,* 194 U. S. 517, 534;

*Columbus Ry. & Power Co. vs. Columbus,* 249 U. S. 399.

**4. The Supreme Court of Ohio and the Court of Appeals of Huron County, Ohio, Have Expressly Upheld the Validity of the Ordinance of October 7, 1890**

In the *quo warranto* case involving the same situation which is now before this court, *State of Ohio ex rel. Martin vs. Ohio Electric Power Company,* 35 O. App. 481, 172 N. E. 615, affirmed 121 O. S. 235, 167 N. E. 877, both the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio held the ordinance of October 7, 1890, to be a valid enactment and to constitute a contract binding upon the parties thereto, and upon the Ohio Electric Power Company as successor of the grantee under the ordinance. The opinions in both of these cases are set forth in full in Appendix B.

The Court of Appeals said at page 489:

> "It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions." (Ohio R. S. 1890, Sections 3454 to 3471a.) "Their context seems

clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon compliance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them."

The Supreme Court said at page 239:

"Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself."

It is claimed that *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky,* 93 O. S. 428, is in conflict with respondent's position that the ordinance of October 7, 1890, constituted a valid and binding contract. In that case the Village of Upper Sandusky brought an action to enjoin the defendant lighting coupany from operating in the streets of the village. The Common Pleas Court of Wyandot County dismissed the petition. The Court of Appeals of Wyandot County upheld the decision of the Common Pleas Court, insofar as the existing lines of

the defendant company were concerned, upon the ground that injunction was not the proper remedy, but enjoined any extensions of the lines of the defendant company. This judgment of the Court of Appeals was affirmed by the Supreme Court of Ohio. It is to be noted that the village did not bring error proceedings from the decision of the Court of Appeals as to existing lines of the lighting company. The decision of the Court of Appeals is affirmed by the Supreme Court solely upon the ground that the defendant company had violated the provisions of a *municipal franchise ordinance of* 1889. The case therefore directly supports the proposition that a franchise ordinance adopted between the years 1887 and 1896 constitutes a valid enactment and a contract, binding upon the public utility operating thereunder. On this subject the court says, at page 442:

> "However, as pointed out, the ordinance in question here was passed in 1889, while the act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it. We are compelled to assume that the allegations of the petition were sustained by the evidence, and that the defendant, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatever for the purposes of public

lighting. *It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.*" (Italics ours.)

The present system for the distribution of electricity operated by the Ohio Electric Power Company was constructed and operated by the Norwalk Incandescent Light Company, the partnership, under the authority of the ordinance of October 7, 1890. (R. 53.) It is clear that the rights under the ordinance were assigned to the successors of the partnership. (R. 54.) Petitioner claims that although the ordinance was invalid as a grant of franchise or right of way, it did inure to the benefit of the petitioner's mortgagor as "an agreement as to the mode of use" of the streets of the respondent city. Respondent insists that the ordinance was either what it purported to be, a franchise grant limited in term to twenty years, or was a nullity. Under elementary rules of statutory and contractual construction the doctrine of entirety of contract applies in a situation such as that now before this court.

In *Columbus vs. Public Utilities Commission*, 103 O. S. 79, Marshall, C. J., says at page 104:

> "Surely the principle of entirety of contract must apply to this case, and it is elementary that one party to a contract, whether entire or divisible, may not invoke the aid of a court for relief from certain conditions and obligations of a contract and at the same time claim the benefits and advantages of other features of the contract. * * *"

In claiming the benefit of the ordinance for certain purposes, the petitioner becomes bound by the limitation of term contained therein.

The ordinance, being a valid and binding contract, became binding upon the individuals and corporations which accepted assignments thereof and which accepted conveyances of the electrical distribution system erected thereunder and operated the same. All such parties, including the petitioner, thereby became bound by the twenty-year limitation contained therein, and on and after the expiration of such ordinance were without right to operate such system upon the streets, alleys and public places of the City of Norwalk.

It follows that, since the petitioner's mortgagor, Ohio Electric Power Company, was operating an electrical distribution system in the City of Norwalk at the time of its mortgage to the petitioner, which had been erected and operated under an easement which had expired at the time of the creation of said mortgage, the petitioner has no right to the continued operation of such system and should have been denied the relief granted to it by the District Court.

**B. The Petitioner Is Estopped to Claim a Present Continuing Right to Have Its Mortgagor, Ohio Electric Power Company, Occupy the Streets, Alleys, and Public Places of the City of Norwalk**

The ordinance of October 7, 1890, was accepted by The Norwalk Incandescent Light Company, the partnership, at the time of its adoption (R. 63). The electrical distribution system now operated by the Ohio Electric

Power Company in the streets of the respondent city was erected by The Norwalk Incandescent Light Company under the grant of right of way given by the ordinance of October 7, 1890. (R. 53.) It is admitted by petitioner that whatever rights were secured by the partnership under the ordinance of October 7, 1890, were assigned along with the electrical distribution system to the various successors of the partnership. In fact petitioner itself claims the benefits of the ordinance. (Bill of Complaint, Section 13, R. 10, 11.)

We submit that under these facts petitioner is estopped to deny that the ordinance of October 7, 1890, constitutes a valid and binding contract and that the petitioner is bound by the twenty-year limitation contained therin. The power of the city to enact such an ordinance thereby becomes wholly immaterial.

Exactly the same situation was before the Supreme Court of the United States in the case of *Bankers Trust Co. vs. City of Raton,* 258 U. S. 328 (1922). The plaintiff in that action as trustee under a deed of trust conveying all the property and franchises of the Raton Water Works Company to it to secure an issue of bonds, sought to restrain the defendant City of Raton from revoking the company's rights to use the streets of the city and from ousting it from such streets. (The same relief is sought in the instant case.) The Trust Company claimed that its mortgagor, by incorporation under the laws of the territory of New Mexico passed February 24, 1887, secured a franchise unlimited in duration to lay its mains and pipes in and along the public streets and alleys of the City of Raton. (The same contention is made by the petitioner in this case in connection with

the incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, respectively.)

The mortgagor company in the *Knox* case entered into a contract evidenced by an ordinance under which the company was granted the right to lay its mains and pipes in the streets of the city. The ordinance was limited in term to twenty-five years. Upon the adoption of the ordinance, the company constructed a water works system in accordance with the terms thereof. The Bankers Trust Company claimed that the twenty-five year ordinance was invalid, or immaterial in view of the alleged grant of a franchise from the state. (The same contention in respect of the ordinance of October 7, 1890, is made by the petitioner in this case.)

The defendant city contended that the acceptance of the franchise ordinance and the construction of a water works system thereunder estopped the plaintiff trustee from claiming that its mortgagor was not bound by the twenty-five year limitation contained in the ordinance and from claiming that it had a right to continue the operation of the water works system after the termination thereof.

In affirming a decree dismissing the bill of complaint, this Court adopted the contention of the defendant city. Mr. Justice McKenna says, at page 335:

> "We are not called upon to review in detail the contentions and consider their various elements. We concur in the view of the city that the Water Works Company *is estopped by its contract with the city, evidenced by Ordinance No.* 10 (which we may remark was ratified by a vote of the citizens of the city), and we construe it as the city construes it. *From what act the power to enact*

*it was derived we need not pronounce.* We may say, however, that the Supreme Court of the state in *Raton Waterworks Co. vs. City of Raton,* 22 N. Mex. 464, said the franchise of the company was granted by an ordinance of the city, and certainly the bill in this case shows that its term was fixed at twenty-five years from July 25, 1891. The term, therefore, had expired when the amended bill was filed. The term of the rights having expired, necessarily the rights granted expired, and the city cannot be enjoined from requiring the removal of the company's system from the streets of the city. * * *" (Italics ours.)

*Bankers Trust Co. vs. Raton* is in all material respects analogous to the situation before the court in the present case, and, upon the authority of that case, the bill in the instant case should be dismissed.

The District Court in its memorandum opinion (R. 233) seeks to distinguish *Bankers Trust Co. vs. Raton* upon the ground that "none of the 'conventional elements' of equitable estoppel are present here. It cannot fairly be said that there was any reliance by the city or any misleading by any of the companies." We submit that the District Court has erred in assuming that there was no reliance by the City of Norwalk upon the ordinance of October 7, 1890. The city allowed The Norwalk Incandescent Light Company to erect a system for the distribution of electricity, using practically all its streets. (R. 53, 63.) It was a similar reliance by the City of Raton that supported the estoppel which the Supreme Court of the United States found to be applicable in that case.

The city further allowed the successors of The Norwalk Incandescent Light Company to continue to operate

the electrical distribution system under the ordinance. The ordinance was printed as Section 62 of General Ordinances of the City of Norwalk. (Petitioner's Exhibit 35, R. 434).

No other claim of right to occupy the streets of the City of Norwalk was ever made by the petitioner, by its mortgagor, or by its predecessors, until the filing of the answer in the *quo warranto* case, *State ex rel. Martin vs. Ohio Electric Power Company.*

The fact that the public lighting contract of April 13, 1905, extended approximately five years beyond the expiration date of the ordinance of October 7, 1890, is not inconsistent with respondent's position. The public lighting contract (Respondent's Exhibit H, R. 541) expressly covers this situation in Section 14 which provides in part as follows:

> "* * * *and provided further that nothing herein contained shall permit said use or occupation of said streets, alleys and other public places after the expiration of this contract, to-wit: August* 31, 1915, * * *
>
> *"The said contractor, at the expiration of this contract, shall upon request of the said city, remove all poles, posts, lamps, wires, and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents and said contractor shall pay to said city all costs and expenses thereby incurred."* (Italics ours.)

The course of negotiations between the city officials and the officers of The Cleveland and Southwestern Trac-

tion Company, which was operating the electrical distribution system at the time of the expiration of the public lighting contract, discloses the understanding of both parties that all rights of the public utility expired upon the expiration of the public lighting contract. (R. 135, 136, 137, 202.)

Likewise the terms of the ordinance of July 1, 1924, (Petitioner's Exhibit 38, R. 438) and the action of the city officials thereunder are not inconsistent with the estoppel which the city is here claiming. That ordinance was a general police regulation dealing with all companies maintaining wires carrying electricity, including interurban railway wires, signal wires, telephone wires, telegraph wires, and lighting and power wires. Whether the Ohio Electric Power Company and its predecessor, The Cleveland and Southwestern Traction Company, were using the streets of the city at the sufferance of the city or whether they were using them under a franchise grant, they would be subject to the terms of this ordinance and were properly required to comply therewith. The fact that the Ohio Electric Power Company was using the streets of the city without right did not exempt it from complying with the terms of the ordinance which was enacted in the interest of public safety.

Other cases holding that a public utility is estopped from asserting that an executed franchise agreement is *ultra vires* the city are:

*Mercantile Trust & Deposit Co. vs. Collins Park & Belt Railroad Co.*, 101 F. 347 (C. C. N. D. Ga., 1900);

*Columbus vs. Public Utilities Commission*, 103 O. S. 79 (1921);

*Mayor of Jersey City vs. North Jersey St. Ry. Co.*, 72 N. J. Law 383, 61 A. 95, 97 (1905);

*City of Emporia vs. Emporia Telephone Co.*, 88 Kan. 443, 129 P. 187 (1913);

*Belfast vs. Belfast Water Co.*, 115 Me. 234, 98 A. 738, L. R. A. 1917 B 908;

*Mitchell vs. Telephone Co.*, 25 S. Dakota 409 (1910). (See also 246 U. S. 396 (1917) for another phase of same litigation);

*Potter vs. Calumet Electric St. Ry. Co.*, 158 F. 521, 529 (C. C. N. D. Ill., 1908).

*Farmer vs. Telephone Co.*, 72 O. S. 526, is clearly distinguishable from the present situation for the reason that the ordinance provision which the plaintiff in that case sought to enforce was expressely prohibited by statute. The ordinance granted to the predecessor of the telephone company the right to use the streets of the City of Salem, and under its terms it was provided that the subscribers in the city receive free telephone service over the lines of the grantee with all other exchanges and subscribers of the grantee within the County of Columbiana, and further that the grantee permit the city to place its police and fire alarm wires and boxes upon the grantee's poles without charge therefor. These provisions were held to be in direct violation of *R. S., Sec.* 3461, which expressly stipulated that "nothing in this section contained shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what

may be necessary to restore the pavement to its former state of usefulness." The court holds that an estoppel cannot operate to nullify an express statutory prohibition. No such question arises in connection with the estoppel which the respondent is asserting in this case.

See *St. Louis vs. Davidson,* 102 Mo. 149, 153, 14 S. W. 825 (1890).

We submit that under the authorities cited above, the petitioner is estopped to claim that it has a present right to have its mortgagor, Ohio Electric Power Company, occupy the streets, alleys, and public places of the City of Norwalk.

**C. The Petitioner Has No Right To Have Its Mortgagor, Ohio Electric Power Company, Occupy the Streets, Alleys and Public Places of the City of Norwalk by Virtue of the Fact of Incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, Respectively.**

*Outline of Respondent's Contentions*

Petitioner's claim that its mortgagor, Ohio Electric Power Company, now holds a perpetual easement in the streets of respondent is based upon its theory that its mortgagor's predecessors in title, The Incandescent Light & Power Company and The Northern Electric Company, secured perpetual easements by incorporation in 1891 and 1895 respectively, under the provisions of the magnetic telegraph company chapter of the Ohio General Corporation Act and particularly under Revised Statutes of 1890, Sections 3454 and 3461.

Respondent contends in this regard:

1. That The Incandescent Light & Power Company and The Northern Electric Company, by incorporation, secured at most merely the capacity to secure an easement in the streets of the respondent city and not a complete and vested property right to operate therein.

If respondent is correct in this contention, it follows:

2. The petitioner's predecessors in title did not comply with the provisions of Revised Statutes Sec. 3461, requiring an agreement with the respondent or an order of the Probate Court, and petitioner can, therefore, claim no rights under such Section.

3. If the ordinance of October 7, 1890, be considered as constituting an agreement with respect to the mode of use of respondent's streets under Revised Statutes Sec. 3461, all rights secured thereunder expired 20 years from the date of such ordinance.

4. The capacity of petitioner's predecessors in title to secure any easement under Revised Statutes Sec. 3461 was terminated by the Act of April 21, 1896 (92 O. L. 204).

5. Any capacity secured by petitioner's predecessors in title upon incorporation to acquire an easement by complying with the provisions of Revised Statutes Sec. 3461 was not assignable and is not now held by Ohio Electric Power Company.

6. The ordinance of July 1, 1924, has no bearing upon this case. It does not constitute a grant of easement or an agreement of any sort.

7. All rights of petitioner's predecessors in title became terminated on the expiration of the public lighting agreement of April 13, 1905.

We call attention to the use by the petitioner of the term "perpetual franchise" throughout its argument upon this question. We submit that the use of this term begs the entire question, for it is obvious that the inquiry must be what franchise did The Incandescent Light & Power Company and The Northern Electric Company secure by incorporation. The petitioner must show an easement to prevail in this case. The right of eminent domain secured upon incorporation may be described as a franchise, and yet it is not a vested property right. We shall have occasion to point out in our consideration of the Ohio cases relied on by the petitioner that in every case when such terms as "right to use the streets," etc., is used, the context clearly shows that it is the right of eminent domain that is referred to and not an easement in the streets.

For the convenience of the court a collection of statutes of Ohio relating to the creation of public utility easements in the streets of municipalities is to be found in Appendix A, *infra*.

**1. The Incandescent Light & Power Company and The Northern Electric Company by Incorporation Secured at Most, as Part of Their Corporate Franchises, the Capacity to Secure an Easement in the Streets of the Respondent City, and Not a Complete and Vested Property Right to Operate Therein.**

The question of the nature of the rights secured by The Incandescent Light & Power Company and The Northern Electric Company upon incorporation is one of statutory interpretation. In determining this ques-

tion, we submit that this court should be guided by the rule laid down in *Blair vs. Chicago,* 201 U. S. 400 (1906), which involved essentially the same question we are here discussing. In considering an act of the legislature of Illinois which the plaintiff in that case claimed granted to it an exclusive right to maintain its tracks in certain streets of the City of Chicago, Mr. Justice Day says at page 463:

> "We may premise, before taking up this act for more detailed consideration, that it is a firmly established rule, which we shall have occasion to refer to later on in this discussion, but which must be borne in mind as we enter upon the consideration of this act, that one who asserts private rights in public property under grants of the character of those under consideration, must, if he would establish them, come prepared to show that they have been conferred in plain terms, for nothing passes by the grant except it be clearly stated or necessarily implied. * * *"

See also a more detailed discussion of this same subject in the same case commencing at the bottom of page 471.

*Wabash R. R. Co. vs. Defiance,* 167 U. S. 88;
*Cleveland Electric Ry. Co. vs. Cleveland,* 204 U. S. 116;
*R. R. Co. vs. Defiance,* 52 O. S. 262, 307.

We suggest that the approach to the interpretation of the statutes of Ohio here involved should be similar to that adopted by Judge Lurton in *Louisville Trust Co. vs. Cincinnati,* 76 F. 296 (C. C. A. 6th, 1896). In that case the court was called upon to consider a claim that Section 12 of the Ohio General Incorporation Act of May

1, 1852 (R. S. Sec. 3283) should be construed to the same effect as petitioner contends R. S. Sec. 3461 should be construed. Judge Lurton says at page 308:

> "The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements upon terms and conditions to be agreed upon between such companies and the local government. When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this well-settled policy has not been departed from and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its road for tolls, when it shall have acquired from the local authority the equally essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business."

**(a) The Magnetic Telegraph Company Chapter**

The Act of January 26, 1887, 84 O. L. 7, Ohio R. S. 3471a, makes the provisions of *Chapter* 4 (*Magnetic Telegraph Companies*) *of Title II* (*Corporations*) *of the Revised Statutes*, in so far as they may be applicable, apply to electric light companies. It therefore becomes necessary to give *in extenso* the provisions of this chapter and to enter into some discussion of its history.

"TITLE II. CORPORATIONS

* * * * * *

## CHAPTER 4

### MAGNETIC TELEGRAPH COMPANIES

"Section

3454. Powers of companies.
3455. Further powers.
3456. May enter upon and appropriate lands.
3457. Limitation upon such authority.
3458. When the land to be appropriated is held by a corporation.
3459. When such land is held by a railroad company.
3460. When the lands lie in more than one county.
3461. How right to use public grounds acquired.
3462. Must receive and transmit dispatches.
3463. When to forward messages by other lines.
3464. Agent must indorse dispatch, when.
3465. Penalties for not transmitting or delivering message.
3466. Penalties against persons connected with companies.
3467. Penalties for knowingly transmitting dispatches forged, etc.
3468. When and how telegraph structures may be removed.
3469. How and when repair of structures enforced.
3470. Companies may consolidate.
3471. Chapter applies to telephone companies.
3471a. Laws applicable to electric light companies.

### POWERS OF COMPANIES

"Sec. 3454. A magnetic telegraph company heretofore or hereafter created may construct telegraph lines, from point to point, along and upon any public road, by the erection of the neces-

sary fixtures, including posts, piers, and abutments necessary for the wires; but the same shall not incommode the public in the use of such road. (50 v. 274, Sec. 47.)

### Powers of Telegraph Companies

"Sec. 3455. Any such company may construct, own, use, and maintain any line or lines of magnetic telegraph, *whether described in its original articles of incorporation or not,* and whether such line or lines are wholly within or partly beyond the limits of this state, and may join with any other company or association in conducting, leasing, owning, using, or maintaining such line or lines, upon such terms as may be agreed upon between the directors or managers of the respective companies; and such companies may own and hold any interest in any such line or lines, or may become lessees of such line or lines, upon such terms as may be agreed upon; but it shall be unlawful for any such company or companies, and the owner or owners of rights of way to contract for the exclusive use thereof for telegraphic purposes. (April 15, 1880: 77 v. 264.)

### May Enter Upon and Appropriate Land

"Sec. 3456. Any such company may enter upon any land, whether held by an individual or a corporation, and whether acquired by purchase or appropriation, or in virtue of any provision in its charter, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph, *and may appropriate* so much thereof as may be deemed necessary for the erection and maintenance of its telegraph poles, piers,, abutments wires, and other necessary fixtures, and for stations, and the right of way over such lands and

adjacent lands sufficient to enable it to construct and repair its lines. (62 v. 72, Sec. 1.)

LIMITATION UPON SUCH AUTHORITY

"Sec. 3457. No such company shall, without the consent of the owner thereof, in writing, enter a building or edifice, or use or appropriate any part thereof, or erect any telegraph pole, pier, or abutment in any yard or inclosure within which an edifice is situate, nor, in cases not provided for in section three thousand four hundred and sixty-one, erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment be overthrown, nor injure or destroy any fruit or ornamental tree. (62 v. 72, Sec. 1.)

WHEN THE LAND TO BE APPROPRIATED IS HELD BY A CORPORATION

"Sec. 3458. When lands *sought to be appropriated* for lines of magnetic telegraph are held by a corporation incorporated under any law of this state, whether held by purchase, or in virtue of any appropriation authorized by its charter or by any law of this state, the right of the company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which the company is authorized to put such lands under its charter; and no such company shall erect poles, piers, abutments, wires, or other necessary fixtures, in such close proximity to any other line of magnetic telegraph authorized by law to be constructed as to interfere mechanically with the practical working of such telegraph. (62 v. 72, Sec. 2.)

WHEN SUCH LAND IS HELD BY A RAILROAD COMPANY

"Sec. 3459. The right of such company to use lands held by a railroad company, for the permanent structures of such telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of the railroad company, where it is practicable to erect the line within those limits; when the company *seeks to appropriate lands that lie beyond those limits, its petition must set forth the facts showing that* it is impracticable to erect such line within said limits, and designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the place or places where the company seeks to establish the line; the probate court shall, in all instances, determine, if it be controverted by the railroad company, whether the erection of the line at the place or places designated will, in any material degree, interfere with the practical uses to which such railroad company is authorized to put such land; and if the court is satisfied that it will so interfere, it shall reject the petition, or require the structure to be erected at such other place or places as the court shall direct; but nothing in this chapter shall be so construed as to authorize any company to appropriate the use of the track or rolling stock of any railroad company for the purpose of transporting poles, materials, or the employes of such telegraph company, or for any other purpose whatever. (62 v. 72, Sec. 3.)

WHEN THE LANDS LIE IN MORE THAN ONE COUNTY

"Sec. 3460. Proceedings to appropriate lands to the use of a company, against a defendant whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of such lands lie, and the dam-

ages shall be assessed, in one proceeding, in respect of all such lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting, or in other counties. (62 v. 72, Sec. 4.)

How Right to Use Public Ground Acquired

"Sec. 3461. When any lands authorized *to be appropriated* to the use of a company are subject to the easement of a street, alley, public way, or other public use, within the limits of any city or village, the mode of use shall be *such as shall be agreed upon between the municipal authorities of the city or village and the company;* and if they can not agree, *or the municipal authorities unreasonably delay to enter into any agreement,* the probate court of the county, in a proceeding instituted for the purpose, shall direct in what mode such telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of the same; but nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of a street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness. (62 v. 72, Sec. 5.)"

* * * * *

Chapter Applies to Telephone Companies

"Sec. 3471. The provisions of this chapter shall apply also to any company organized to construct any line or lines of telephone; and every such company shall have the same powers, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies.

ELECTRIC LIGHT COMPANIES: LAWS MADE APPLICABLE TO

"Sec. 3471a. The provisions of this chapter, *so far as the same may be applicable,* shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies. (January 26, 1887; 84 v. 7.)" (Italics ours.)

These sections as later amended are now found in General Code of Ohio, Sections 9172 to 9198.

Petitioner claims rights under Sections 3461 and 3454. It is to be noted that Section 3454 was adoptel in 1852 as part of the General Incorporation Act adopted in that year. Sections 3455 to 3461, inclusive, were all part of an Act of March 31, 1865, and are properly to be read together. The provisions of Section 3461 obviously govern in cases of inconsistency with the provisions of Section 3454.

The original enactments of the sections quoted above are set forth in Appendix A, *infra.*

**(b) Analysis of Magnetic Telegraph Company Chapter**

R. S. Sections 3454 to 3461, inclusive, are part of the incorporation statutes of the State of Ohio and deal with the powers secured by magnetic telegraph companies upon incorporation under the laws of the state. They clearly have no relationship to partnerships or

individuals. These sections constitute merely a grant of corporate franchise and do not give to corporations organized thereunder any easement or other vested property right to use the streets or other public places of municipal corporations. To secure such vested property right, compliance with the procedure provided in Section 3461 is required.

Sections 3455 to 3461, when read together, constitute a grant of the power of eminent domain to corporations organized thereunder, and nothing more. Sections 3456, 3457, 3458, and 3459 deal with the right of the corporation to appropriate the property of individuals and corporations. Section 3461 deals with the situation where property authorized to be appropriated by Section 3456 is subject to the easement of a municipal corporation. It fixes the procedure whereby such property may be appropriated. The procedure called for is either an agreement with the municipal corporation or an order of the Probate Court. The section clearly places the burden of securing an agreement or an order upon the company desiring to secure the easement in the particular streets or public places of a municipal corporation.

The provisions of Section 3454 with regard to the construction of telegraph lines along "any public road" are limited to locations outside of municipal corporations, locations within municipal corporations being covered by Section 3461, which was adopted at a later date. The public roads referred to in Section 3454 are those designated in *Title VII, R. S. of* 1890, being state roads, county roads, and township roads. The provisions of the Revised Statutes with regard to the streets, alleys,

and public places of municipalities are found in *Title XII, Division* 8, *Chapter* 13, *R. S. of* 1890, and are never referred to as "public roads" or "roads."

The interpretation of the Magnetic Telegraph Companies Chapter which we have suggested above, namely, that it confers upon companies organized thereunder only the inchoate right of eminent domain, rather than a vested easement or property right in the streets of municipal corporations, is in accord with *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (1901). *R. S. Sec.* 3471 made the provisions of the Magnetic Telegraph Companies Statutes applicable to telephone companies organized thereunder. In the *Zanesville* case the telephone company had attempted to reach an agreement with the City of Zanesville relative to the use of its streets, but had been unsuccessful. It applied to the Probate Court for an order allowing it to use the streets of the city. The Probate Court refused the order upon the ground that *R. S. Sec.* 3461 was unconstitutional, being in violation of the doctrine of distribution of powers among the legislative, executive, and judicial branches of the state government. On the occasion of the first argument of the case, the judgment of the Probate Court was affirmed, 63 O. S. 442. Upon reargument, the judgment of the Probate Court was reversed, 64 O. S. 67. A careful reading of the opinion shows that the basis of the decision is the conclusion of the court that R. S. § 3461 confers upon corporations organized under the Magnetic Telegraph Company Chapter a right of eminent domain with respect to municipal property.

By stringing together sentences and parts of sentences irregularly taken from their context in the opin-

ion, Petitioner, at pages 57-59 of its brief, attempts to convince this court that *Zanesville vs. Zanesville Telegraph & Telephone Co.* supports its contention that incorporation under these statutes gave rise to a perpetual easement in its predecessors in title. We are confident that a consideration of the opinion itself by this court will expose the misconstruction of the opinion and the juggling of quotations which Petitioner has indulged in.

The Ohio Supreme Court did not hold that a magnetic telegraph company, telephone company or electric light company organized under these statutes secured by incorporation an easement in the streets of a municipal corporation. The references quoted by Petitioner to the franchise secured from the state must be read with the rest of the opinion. When so read, it is clear that the court regarded the right secured from the state as a right of eminent domain and not an easement or other vested property right.

Petitioner may contend, as it did in the lower courts, that the requirement of Section 3461 that the company desiring to use the streets and the municipal corporation enter into an agreement with regard to the mode of use of the streets, merely reserves to the municipal corporation the powers which it would have in any event under its general police powers to regulate the activities of the electric light company in the interest of public health and safety. The *Zanesville* case is direct authority against this proposition, for the case holds that the powers of the Probate Court in Section 3461 are not administrative or legislative but are the same as those which the court has in eminent domain proceedings. The

police power of a municipality is distinctly legislative in nature.

*Queen City Telephone Co. vs. Cincinnati,* 73 O. S. 64 (1905), also supports respondent's position that the Magnetic Telegraph Companies Chapter grants to companies organized thereunder at most the right of eminent domain as to the streets, alleys, and public places of municipal corporations. The plaintiff telephone company brought an action in the Probate Court asking for an order allowing it to put its telephone wires in conduits throughout the streets of the city. The questions before the Supreme Court were:

> "1. Was the Queen City Telephone Company so organized at the time it made application to the city, and later, as to give it a standing calling for action by the council and afterward by the Probate Court? 2. Even though the company were legally organized, did the petition filed in the Probate Court itself state a case warranting affirmative action in favor of the company by that court? 3. If the petition did state a case warranting such affirmative action, had that court power to grant a right to such company to place its wires and apparatus in conduits under ground?"

In holding that the plaintiff company was not so legally organized as to give it standing to maintain the action, the court says at page 77:

> "As held in *Zanesville vs. Tel. Co.,* 64 Ohio St. 67, *the proceeding is practically for an appropriation; that is, it partakes of the character of an exercise of the right of eminent domain.* In *Powers vs. Ry. Co.,* 33 Ohio St. 429, it is held that it is essential to a judgment of condemnation in an appropriation proceeding that the company should prove its corporate existence, and among

other things show that it has been fully organized by the election of directors. *Proof of the existence of the corporation and of its right to make the appropriation is also now required by Section 6420, Revised Statutes, and the determination by the court of those questions favorable to the company is made jurisdictional.* * * *" (Italics ours.)

The court also held that it was necessary to state in the petition what streets the company proposed to use and the proposed method of use, and that the company had no right to place its wires in conduits under Section 3461. In connection with the discussion of this subject, the court says at page 81:

"It is of course conceded as now well settled that the *general* power to occupy the streets of a municipality by a telephone company is derived from the state, as held in *Zanesville vs. Tel. Co., supra* and *Farmer vs. Tel. Co.,* 72 Ohio St. 526. (Referring to this last case, it may not be amiss here to remark that on page 532 the types make the writer say that the Probate Court is a substitute in all respects for the municipal authorities. This was not intended. The words 'as to rates,' which should precede the above statement have dropped out. Without them the statement is too broad.) *But, taking the sections of the statute as a whole and considering the conditions imposed on the exercise of such right, it is not to be inferred that the municipal authorities are stripped of all power to finally determine any matter relating to the general subject.* * * *" (Italics ours.)

This language must be read with the language quoted above from page 77, the general power referred to on page 81 being obviously the right of eminent domain discussed on page 77.

See also same case in Circuit Court, 5 O. C. C. (N.S.) 411.

The District Court in its memorandum opinion, relegates the consideration of respondent's contentions with regard to the rights accruing to the predecessors of the Ohio Electric Power Company by virtue of their incorporation in 1891 and 1895, respectively, to note 3 of his opinion. (R. 232.) At that point, by means of a rhetorical question, it is suggested that the holding of *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (discussed *supra*, p. 62) that the companies organized under the Magnetic Telegraph Statutes secured only a right of eminent domain as to the streets of municipal corporations, is to be disregarded upon the theory that *R. S. Sec.* 3461 merely confirmed in the municipality its right to pass police regulations from time to time with regard to such companies. In support of this view, *Farmer vs. Telephone Co.*, 72 O. S. 526, 532, and *Telephone Co. vs. Cincinnati*, 73 O. S. 64, 81, are cited. The citation of *Telephone Co. vs. Cincinnati* for this proposition is surprising in view of the fact that the holding of the *Zanesville* case is therein reaffirmed. The petition of the telephone company was held to be properly dismissed for the reason that it did not fulfill the requirements of proof required by the statutes governing appropriation proceedings in the Probate Court.

*Farmer vs. Telephone Co.* simply held that the municipality could not require compensation for the use of its streets by a telephone company, in view of the express prohibition in R. S. Sec. 3461 against such compensation.

Ignoring the holdings of the *Zanesville* case and of *Telephone Co. vs. Cincinnati* is inconsistent with the

position of the court as stated in its memorandum opinion that it is bound to follow the law of Ohio as enunciated in these very cases, in view of the fact that the bondholders represented by the plaintiff secured their bonds upon the "faith" of this line of decisions.

The question asked by Judge Hahn in note 3 also ignores the express requirement in *R. S. Sec.* 3461 of an agreement between the municipal corporation and the utility. As suggested in the quotation from *Atlantic Coast Line vs. Goldsboro Co.*, 232 U. S. 548, inserted by Judge Hahn at this point, the "police power" is not a matter which is the subject of agreement. Again if the action of the municipal corporation or the Probate Court, under *R. S. Sec.* 3461, was merely an exercise of the police power, then clearly *Zanesville vs. Zanesville Telegraph & Telephone Co., supra,* would have been disposed of as it was in the original hearing by dismissing the petition upon the ground that the delegation of an exercise of the police power to the Probate Court constituted a violation of the doctrine of separation of powers, the police power being clearly legislative in nature.

*Zanesville vs. Zanesville Telegraph & Telephone Company, supra,* and *Queen City Telephone Company vs. Cincinnati, supra,* deal with the nature of the proceedings in Probate Court upon failure of the company to secure an agreement with the municipal corporation. They do not involve directly the question of the nature of the rights of such company where it has sought no agreement with the municipal corporation or order of the Probate Court or where whatever agreement it had with the municipal corporation has expired. Only two

Ohio cases directly consider such situations. They are: *State ex rel. vs. Central Union Telephone Co.*, 11 O. C. C. 55, and *State ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. Appeals 481, 121 O. S. 235. Both of these cases support the contention of the respondent that by incorporation petitioner's predecessors, The Incandescent Light & Power Company and The Northern Electric Company, received at most the capacity to secure an easement in the streets of the City of Norwalk and not a vested property right therein.

In *State ex rel. vs. Central Union Telephone Co.*, 11 O. C. C. 55 (1895), an action in *quo warranto* was brought to oust the telephone company from the streets of the City of Dayton. The question before the court was the right of the company to continue to occupy the streets of the City of Dayton after the expiration of a ten-year ordinance. In discussing this question, Judge Summers says at page 57:

> "The words 'when any lands authorized to be appropriated,' etc.," (used in Section 3461) "imply that the authority has been previously conferred, but in our opinion this is of little if any significance, for the sections are in *pari materia*," (referring to Sections 3454, 3456, and 3461) "and the franchise to so use the streets conferred by the state is upon the express condition that the mode of use shall be such as shall be agreed upon between the city and the company, and in the event that they cannot agree, that the Probate Court shall direct in what mode the telephone line shall be constructed along such street. *This clearly contemplates an agreement as to the mode of use prior to any occupancy of the streets by the company, and such agreement with the council or direction by the Probate Court as to the mode of*

*use is inseparable from the right to use the street for telephone purposes and the right ceases with the expiration of the agreement or direction upon which it is conditioned.* We do not understand counsel to claim that the company could have entered upon the streets and erected its poles and strung its wires without an agreement with council or direction in a proceeding in the Probate Court. If, then, it enters upon the streets, erects its poles and strings its wires under and by virtue of an agreement between it and the city council which limits its right to such occupancy to a period of ten years, how can it claim its right still stands when the foundation of it is gone? * * *

"These provisions" (*R. S. Sec.* 3283 dealing with the use of the streets of muncipal corporations by railroad companies) "are not unlike those of the section under consideration, and we think the construction we have given the latter warranted by that given by the Supreme Court to the former. *Railroad vs. Commissioners,* 31 Ohio St. 338; *State ex rel. vs. Railroad Co.,* 36 Ohio St. 434; *Railroad Co. vs. Cobb,* 35 Ohio St. 94.

" 'Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal bodies over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms when not indispensable to give effect to the grant.' *Railroad Company vs. Defiance,* 52 Ohio St. 262." (Italics ours.)

The same case came before the same court in *State ex rel. Matthews vs. Central Union Telephone Co.,* 14 O. C. C. 273 (1897). Upon final hearing, the court refused a writ of *quo warranto* upon the ground that the

writ should not issue until it should appear that an agreement between the city and the telephone company could not be reached and the company delayed unreasonably to apply to the Probate Court for an order under *R. S. Sec.* 3461. There is nothing inconsistent between this opinion and the decision of the court in 11 O. C. C. 55. It is to be remembered that as to telephone companies, *R. S. Sec.* 3461 was still in effect in May, 1897, when this case came on before the Circuit Court for the second time. The telephone company therefore still had a right of eminent domain as to the streets of the City of Dayton. The refusal of the court to grant an order of ouster is merely an illustration of the doctrine that a court will not decree the doing of a futile act since the company could still bring an action in the Probate Court to appropriate the easement which would allow it to put its poles back upon the streets. The same result would be reached in the case of an action between a private individual and the public utility where the public utility was using the property of the private individual without having resorted to appropriation proceedings.

See *Smith vs. Central Dist. Tel. Co.*, 2 O. C. C. 259, 279 (1886).

The case in 14 O. C. C. 273 has no application here for the reason that the right of The Northern Electric Company to bring appropriation proceedings for the use of the streets of the City of Norwalk has been revoked by the Act of April 21, 1896, 92 *O. L.* 204, as we shall hereafter point out.

In *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, affirmed 121 O. S. 235 (for

opinions in full see Appendix B, *infra*), the Ohio Electric Power Company urged exactly the same propositions upon the Court of Appeals of Ohio and the Supreme Court of Ohio with regard to the effect of *R. S. Sec.* 3461, which petitioner urges here. The Court of Appeals held that since no action had ever been taken by The Incandescent Light & Power Company or The Northern Electric Company to secure an easement under *R. S. Sec.* 3461 prior to the revocation of the rights thereof by the Act of April 21, 1896, the Ohio Electric Power Company could claim no rights under such statutes. In other words, the Court of Appeals held that The Incandescent Light & Power Company and The Northern Electric Company secured by incorporation at most the capacity to acquire an easement in the streets of the City of Norwalk and did not by incorporation secure a vested easement. Upon this subject, the Court of Appeals says at pages 488-490:

> "Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the 'mode of use' by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company,

its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws 204), *neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy.* * * *

"Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; *and such*

*agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. State ex rel. vs. Central Union Telephone Co.,* 11 C. C. 55, 5 C. D. 311." (Italics ours.)

The decision of the Court of Appeals was affirmed by the Supreme Court of Ohio. We submit that this court should give great weight to the decisions of the Court of Appeals of Huron County and the Supreme Court of Ohio dealing with the very situation which is involved in the present litigation.

*City of Opelika vs. Opelika Sewer Co.,* 265 U. S. 215 (1924);

*Southern Wisconsin Railroad Co. vs. Madison,* 240 U. S. 457, 461;

*Milwaukee Electric Railway Co. vs. Wisconsin,* 252 U. S. 100;

*Gilchrist vs. Interborough Rapid Transit Co.,* 279 U. S. 159, 208;

*Old Colony Trust Company vs. City of Tacoma,* 230 F. 389 (C. C. A. 9th, 1917).

Essentially the same question of construction of the statutes of Ohio came before the Circuit Court of Appeals for the Sixth Circuit in *Louisville Trust Co. vs. City of Cincinnati,* 76 F. 296 (1896, Taft, Lurton, and Hammond, JJ.). In that case plaintiff contended that by incorporation its mortgagor received a perpetual franchise to occupy the streets of the City of Cincinnati with an inclined plane railway. The basis of its claim was Section 12 of the General Incorporation Act of May 1, 1852 (*R. S. Sec.* 3283). This section, dealing with the method whereby railroads secured the right to occupy

the streets of municipalities, is almost the exact counterpart of *R. S. Sec.* 3461 (enacted as a supplementary provision to the same act). This court held, in accord with the contentions of the respondent here, that such statute did not confer a vested easement in the streets of a municipal corporation. Judge Lurton says at page 308:

> "The argument that, because the state had imposed no limitation upon the duration of the corporate franchises of this company, therefore the term for which it held its street grants was likewise intended to be unlimited, is illogical. It loses sight of the distinction between those franchises conferred by the state and obtained by organization under the state law and those property or contractual franchises not granted by the state, and not inherent in the corporation as such, but which come from the local authority having the right to grant the right to occupy a public highway. We do not mean to intimate that the municipal or local authority is the only source from which such an easement could come in Ohio. *The legislative history of the state is such, however, as to indicate that the settled public policy of the state is not to confer such easements, but to refer all such companies to the municipality upon whose streets or highways they wish to exercise the franchises conferred by the state for the requisite street easements, upon terms and conditions to be agreed upon between such companies and the local government.* When, therefore, we come to construe an Ohio statute providing for the organization of either ordinary railway or street car companies, we may well do so with the expectation that this well-settled policy has not been departed from, and that the state has stopped with the grant of the usual and necessary corporate franchises proper, by which it has been endowed with power to operate its road for tolls, *when it shall have acquired from the local authority the equally*

*essential right of occupying with its tracks the particular streets upon which it proposes to conduct its business.* That the state did not undertake, in the general incorporation act of May 1, 1852, to confer upon any of the class of corporations therein provided for the power to enter upon and occupy with its tracks the public streets of any city or village, or the public highway of any township or county, before obtaining the consent of the local authority concerned, is too clear for discussion. Section 12 of that act expressly provided how such street or highway rights might be obtained, that section being in these words:

"'Sec. 12. If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley, or public way, or ground of any kind or any part thereof, it shall be competent for the municipal or other corporation or public officer or public authorities, owning or having charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; *and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purpose of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act.*'

"*The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to*

*agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant.''* (Italics ours.)

We submit that the same reasoning applies in construing *R. S. Sec.* 3461.

In *Pomona vs. Sunset Telephone Co.*, 224 U. S. 330, the Supreme Court of the United States placed a similar interpretation upon an analogous section of the Constitution of the State of California. As to this feature of the case, Mr. Justice Holmes says at page 342:

> ''The claim based upon the amendment to Article XI, Sec. 19, of the Constitution of the State, October 10, 1911, does not impress us. Before that date the article provided that in cities having no public works for artificial light, etc., individuals or corporations of the state duly authorized should have the privilege of using the streets, etc., for the purpose, upon the condition that the municipal government should have the right to regulate the charges. By the amendment 'any municipal corporation may establish and operate public works for * * * telephone service' either by construction or by purchase. It then goes on, 'Persons or corporations may establish and operate works for supplying the inhabitants with such service upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof.' We agree with the appellants that the amendment seems intended as a step in the direction of municipal ownership or control. The words 'upon such conditions,' etc., are not to be confined to police powers, which are conferred by Section 11 of the same article, but are of general import. *If the municipal corporation does not see fit to establish the public works itself*

*it may let others do it, but its power to impose conditions excludes the notion that the Constitution alone is a grant to others of a right to occupy the streets without its consent.''* (Italics ours.)

See also

*Southern Bell Telephone Co. vs. Richmond,* 103 F. 31 (C. C. A. 4th, 1900);

*Indianapolis vs. Consumers' Gas Trust Co.,* 144 F. 640 (C. C. A. 7th, 1906);

*In re Rochester Railway Co.,* 123 N. Y. 351, 25 N. E. 381 (1890).

The statutes considered by the courts in the cases just cited empowered the municipal corporations to fix the ''terms and conditions'' of the occupation of its streets by the utility. The language used in R. S., Sec. 3461 is ''mode of use.'' The terms are synonymous. It seems probable that the term ''mode of use'' was chosen by the legislature to prevent any inconsistency between the grant of power to the city contained in Section 3461 and the prohibition contained in the last clause of the section against any compensation to the city for the use of its streets other than such as might be necessary to return the streets to their former state of usefulness.

An agreement as to ''mode of use'' contemplates provisions as to what streets are to be used, the type of construction, location of poles, nature of insulation, replacing of public property in as good condition as it was before construction, and payment to the city of money necessary for such purpose. *Queen City Telephone Co. vs. Cincinnati,* 73 O. S. 64, and see opinion of Judge Swing in 5 O. C. C. (N.S.) 411. The provisions of such agreement would necessarily vary in every particular

case, depending upon the nature and extent of the activities contemplated by the company, the nature of the municipality, and the type of electricity to be distributed by the company. The term for which the company was to use the streets under the easement secured by the particular agreement would have a definite bearing upon all of the other provisions of the agreement. In other words, the city by its power of agreement with the company had full control over the operations of the company in its streets, subject to the inhibition against receiving compensation above referred to, and subject to the possibility that the company might choose to secure an easement by an appropriation proceeding in Probate Court rather than accept the agreement required by the city. The municipal corporation would have no greater power if the words "terms and conditions" were substituted for "mode of use." In *Louisville Trust Co. vs. Cincinnati, supra,* the analogy is even more direct for the statute there under consideration provided for Probate Court proceedings in event of disagreement between the municipality and the utility.

The analysis made by Mr. Justice Clarke in *Hardin-Wyandot Lighting Co. vs. Upper Sandusky,* 251 U. S. 173, of *Revised Statutes, Sec.* 3461, and the effect of the later Act of April 21, 1896, thereon (see p. 100, *infra*) is in accord with respondent's position. He says at page 176:

> "As we have seen, when the ordinance of 1889 was passed the statute then in force provided that the 'mode' in which the streets could be used for electric lighting and power appliances must be agreed upon between the village and the company, but that if they failed to agree it must be deter-

mined by the Probate Court, and the amendment, now claimed to be unconstitutional, consisted simply in giving to the municipality the exclusive control over the erection of any such appliances in the streets instead of the prior qualified control."

He further says at page 178:

"This act was a general one, applicable to all electric lighting companies then operating, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities *complete control* over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, *instead of the like control* which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets." (Italics ours.)

We therefore submit that *Louisville Trust Co. vs. Cincinnati, supra; Pomona vs. Sunset Telephone Co., supra; Indianapolis vs. Consumers' Gas Trust Co., supra,* and *In re Rochester Railway Co., supra,* dealing with the power of a municipality under analogous statutes, are in point here.

**(c) Analysis of Hardin-Wyandot Lighting Co. vs. Upper Sandusky, 93 O. S. 428 (Affirmed, 251 U. S. 173)**

Petitioner contends that this court is precluded from following the interpretation placed upon the statutes of Ohio by the Court of Appeals of Huron County, Ohio, and the Supreme Court of Ohio in *State ex rel. Martin vs. Ohio Electric Power Company, supra,* by the decision of the Supreme Court of Ohio in *Hardin-Wyandot*

*Co. vs. Village of Upper Sandusky*, 93 O. S. 428 (1916). Petitioner, we believe, also relies in this regard upon *Zanesville vs. Zanesville Telegraph & Telephone Co.*, 64 O. S. 67 (1901), and *Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64. These cases, however, as shown at pages 66 to 81, *supra*, support respondent's contentions rather than those of the petitioner.

It is petitioner's position that the bondholders whom it represents were entitled to rely upon *Hardin-Wyandot Co. vs. Village of Upper Sandusky* and that a later decision contrary to the *Hardin-Wyandot Co.* case cannot adversely affect such bondholders. This contention of petitioner is based upon the so-called doctrine of *Gelpcke vs. Dubuque* (1 Wallace 175). We submit that no such extension of *Gelpcke vs. Dubuque* should be sustained. Assuming, however, for the purposes of the present argument that the doctrine of *Gelpcke vs. Dubuque* of estoppel against change of judicial decision with regard to interpretation of state statutes is applicable to the interpretation of the statutes dealing with corporate franchises to the same extent that it is applicable to the statutes dealing with the validity of municipal bonds, we submit that before the doctrine has any application it must be shown that there was a *clear* decision of the question of interpretation involved from which the courts of the state have deviated. Certainly bondholders are not entitled to rely upon *obiter* which may have crept into cases not dealing with the question which is now before this court.

The fact that the decision of the District Court, as reflected in its memorandum opinion (R. pp. 211 to 239), is based upon an acceptance of petitioner's contentions

as to the effect of *Hardin-Wyandot Lighting Co. vs. Upper Sandusky* calls for a careful consideration of that case.

*Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky* does not estop respondent from urging the interpretation of the statutes of Ohio which it has set forth above, for the following reasons:

1. The question now before this court was not before the Supreme Court of Ohio in that case.

2. The actual decision of the court gave effect to and enforced a municipal ordinance relating to the right to use its streets, and such decision is only consistent with the interpretation which the respondent has placed upon the statutes now before this court.

3. The language of the case, if read in the light of the authorities cited, is clearly consistent with respondent's interpretation of the statutes in question.

(1) Different Question Involved in Hardin-Wyandot Co. vs. Upper Sandusky

In *Hardin-Wyandot Co. vs. Upper Sandusky* the Village of Upper Sandusky brought an action *to enjoin* the lighting company from continuing to occupy the streets, alleys, and public places of the village and from extending its electrical distribution equipment. On March 4, 1889, the village passed an ordinance granting a franchise to the Citizens Electric Light and Power Company unlimited as to term, and in the same ordinance made a contract with the city for a fixed period of time for the lighting of the public thoroughfares. Under that ordinance the company built a complete system for fur-

nishing commercial and public lighting. Upon the expiration of the public lighting contract, the company and the city could not agree upon the terms of a new contract for public lighting, and the company abandoned its public lighting equipment.

The Court of Common Pleas dismissed the bill and gave judgment for the defendant. The Court of Appeals reversed the judgment of the Court of Common Pleas and *granted an injunction as to extensions of the commercial system of the lighting company,* but refused any injunction as to the existing system of the lighting company upon the ground that *quo warranto* and not injunction was the proper remedy to oust the lighting company from the streets of the village.

The lighting company appealed from the decision of the Court of Appeals enjoining the extension of its lines. The village did not appeal from the decision of the Court of Appeals refusing an injunction as to existing lines.

The Supreme Court of Ohio affirmed the judgment of the Court of Appeals enjoining the lighting company from extending its lines, upon the ground that the abandonment of the public lighting equipment constituted a violation of the *municipal franchise* of March 4, 1889. In view of the basis of decision, all of the discussion in the case with regard to rights secured by the lighting company from the State of Ohio through the incorporation of its predecessor in 1892 is obviously *obiter.* The question of the basis of the rights of the company as to its existing system was not before the Supreme Court of Ohio for the reason that the village took no appeal on that phase of the case. That the decision of the case was placed squarely upon a violation of the municipal ordinance of

March 4, 1889, is shown by the following excerpt from Judge Johnson's opinion (93 O. S. 428, 442):

> "However, as pointed out, *the ordinance in question here* was passed in 1889, while the Act of 1887 was still in force. As to the judgment here attacked, inasmuch as neither the agreed statement of facts referred to in the decree of the Court of Appeals nor any other evidence has been brought upon the record by bill of exceptions or entry of the court, we are not able to estimate the force of plaintiff in error's argument with reference to it. We are compelled to assume that the allegations of the petition were sustained by the evidence, and that the defendant, without the knowledge or consent of the plaintiff, removed all of its street lights from the streets, avenues and other public thoroughfares in the village, removed all of its wires, cut down and removed all of the poles used for the support of said wires and lights, completely dismantled its street lighting system and rendered itself wholly unable to furnish any electricity whatever for the purposes of public lighting. *It is manifest from Section 3 of the ordinance that the parties contemplated public lighting as an essential consideration leading to the granting of the franchise which was accepted by the predecessor of the plaintiff in error.*
>
> "In this posture of the case, while in view of the statutory provisions which were in force at the inception of the enterprise the village would not be entitled to annul the company's rights, still, by reason of the facts stated above and the voluntary abandonment by the company of its rights and privileges to the extent set forth, it cannot now return and repossess itself of such rights as it abandoned without the consent of the village in accordance with existing law.
>
> "The judgment and decree of the Court of Appeals will, therefore, be affirmed." (Italics ours.)

(2) The Decision Is Consistent Only With Interpretation of Statutes Urged by Respondent

In the *Hardin-Wyandot* case the Citizens Electric Light and Power Company secured from the Village of Upper Sandusky a franchise unlimited in term. The lighting company contended that the municipal franchise of March 4, 1889, was of no importance or effect, for the reason that the lighting company had secured a vested easement right to use the streets of the village by virtue of its incorporation in 1889. In holding that a violation of such franchise ordinance of 1889 constituted grounds for injunction against extensions to the system of the lighting company, the Supreme Court of Ohio in effect denied the lighting company's contention that it secured a vested easement merely by incorporation and that the municipal franchise of 1889 was of no importance. The actual decision of *Hardin-Wyandot Company vs. Village of Upper Sandusky,* based as it is upon the validity of the municipal franchise ordinance of 1889, is consistent only with respondent's interpretation of the statutes in effect at that time.

(3) The Opinion Supports Respondent's Contentions

The language upon which petitioner relies in *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky* to support its contentions with respect to the proper interpretation of R. S. 3461 is the following (p. 439):

> "This act did not repeal the Act of May 12, 1886, *supra,* in express terms, but when the two acts are construed together it is clear that it was

> the intention of the legislature to confer upon electric light companies 'the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.' *This was the state of the law at the time of the granting of the franchise* (March 4, 1889) *which is involved in this case.* Therefore, under the holdings in the cases cited, the grantee company derived its *general* power to occupy the streets from the state." (Italics ours.)

If the above quotation is given the effect which petitioner contends for it, it becomes upon scrutiny absurd. Petitioner contends that the language quoted means that an electric light company incorporated between 1887 and 1896 received by incorporation a complete and vested easement to use the streets of any or all municipal corporations of Ohio. If such were the case, the date of the granting of the franchise referred to in the above quotation would be the date of the incorporation of Citizens Electric Light and Power Company and not the date of the passage of the municipal ordinance, which was March 4, 1889. It is clear from the quotation given above that the court regarded the municipal franchise ordinance as essential to the claim of easement made by the lighting company in that case. The words "general power" must be taken to mean capacity to secure an easement by compliance with the procedure required by *R. S. Sec.* 3461, namely, by entering into an agreement with the municipal corporation or securing an order from the Probate Court.

On the basis of the foregoing analysis, we submit that *Hardin-Wyandot Lighting Co. vs. Village of Upper Sandusky* should not prevent this court from consider-

ing and following the interpretation placed upon the statutes in question by the Supreme Court of Ohio in *State of Ohio ex rel. Martin vs. Ohio Electric Power Company, supra,* and the interpretation placed upon the counterpart of such statutes by the Circuit Court of Appeals in *Louisville Trust Co. vs. Cincinnati, supra.*

### (d) Results of Following the Interpretation Urged by Petitioner

In interpreting the statutes involved in this case, this court may properly consider the results of adopting the respective constructions suggested by the petitioner and by the respondent. Petitioner contends that by incorporation alone, its predecessors, The Incandescent Light & Power Company and The Northern Electric Company secured a complete and vested right to use the streets, alleys, and public places of the City of Norwalk, and that such right was assignable and not subject to revocation or amendment. We submit that if petitioner's contention is correct, it follows that every electric light company incorporated between 1887 and 1896, every telephone company incorporated between 1880 and the present time, and all telegraph companies incorporated under the laws of Ohio between 1854 and the present time, or any assignee or successor of such companies (whether an individual, an Ohio corporation, or a foreign corporation), may now go upon the streets, alleys, and public places of any municipal corporation of the State of Ohio with their poles, wires, and other equipment, and that the only power which the municipal corporations of Ohio might exercise

over such company or individual is that of general police regulation. We submit that such wholesale creation of easements by incorporation alone is an absurd result which could not have been intended by the legislature.

In *Pawhuska vs. Pawhuska Oil & Gas Co.*, 28 Okla. 563, the claim was made that an Oklahoma statute relating to pipe line companies, closely analogous in language to R. S., Sec. 3461, should be given the construction which plaintiff urges upon this court. The court says at page 568:

> "To construe Section 12 as contended for by the plaintiff in error would be tantamount to holding that it was a grant of a perpetual blanket franchise to every domestic pipe line corporation, as to every town or city of the state. Without determining whether the authority to grant franchises as to cities and towns is exclusively lodged in the municipalities, or may be exercised also by the legislature, it not being clear that it was the intention of the legislature by said section to grant such a blanket franchise, and under the rule that as to every party claiming a special privilege or exemption the burden of establishing the same rests upon such party, and a strict construction obtaining against said party (*Oklahoma City vs. Shields*, 22 Okla. 265, 100 Pac. 559), we hold that the defendant in error, by virtue of said Section 12, has not, without more, a franchise to lay, use, and maintain gas pipes and mains, with all necessary and proper attachments and connections and appurtenances, upon and below the surface of the streets, alleys, sidewalks, etc., of the City of Pawhuska, for the purpose of maintaining a system of gasworks in said city, to sell and supply gas to it and its inhabitants."

The same claim of perpetual easement by incorporation was made in *Toronto Electric Light Co. vs. City of Toronto,* 33 Ont. L. Rep. 267 (affirmed by the Privy Council, 1917 A. C. 84), a case closely analogous to the case at bar. The Ontario court and the Privy Council found such an interpretation of the statute there applicable to be unreasonable.

Petitioner may contend that the rights of The Incandescent Light & Power Company and The Northern Electric Company were confined to the City of Norwalk by virtue of the fact that their principal place of business was to be conducted there. We call attention to the provision of *R. S. Sec.* 3455 (*supra,* p. 58) which makes the location of the business of the company as stated in its articles of incorporation immaterial and confers upon companies created under Chapter 4 the power to exercise rights granted thereby throughout the State of Ohio. It is clear under the incorporation laws of the State of Ohio that a corporation is not confined, in its operations, to the place named in its charter as the principal place where its business will be carried on. In making such contention, the petitioner seeks to read into the statutes something which is obviously not there in order to avoid the absurd result which follows from the interpretation which plaintiff places upon these statutes.

We submit that the interpretation of the statutes in question urged by the respondent is a reasonable interpretation supported by the authorities and in harmony with the policy of the State of Ohio relating to the creation of easements in the streets of its municipal corporations. We shall next show that under such interpreta-

tion petitioner holds no right to have its mortgagor, Ohio Electric Power Company, occupy the streets, alleys, and public places of the City of Norwalk.

**2. The Petitioner's Predecessors in Title Did Not Comply With the Provisions of Revised Statutes, Sec. 3461, Requiring an Agreement With the Respondent or an Order of the Probate Court, and Petitioner Can, Therefore, Claim No Rights Under Such Section.**

No order from the Probate Court was ever secured by The Incandescent Light & Power Company or The Northern Electric Company, or by the petitioner or any of its predecessors in title. It therefore is incumbent upon the petitioner to show that The Incandescent Light & Power Company or The Northern Electric Company secured an agreement with the City of Norwalk as to the mode of use of the streets, alleys, and public places of the city.

Petitioner finds such agreement in the ordinance of October 7, 1890, granting to The Norwalk Incandescent Light Company, the partnership, a right of way in the streets, alleys, and public places of the City of Norwalk, subject to certain conditions, for a term of twenty years. Petitioner urges that the ordinance of October 7, 1890, was invalid, null, and void for the purpose for which it was intended by the city and The Norwalk Incandescent Light Company, the original contracting parties (the creation of a binding 20-year contract), but that it remained dormant until resuscitated by the incorporation of the successors of the partnership almost a year later, and then not as a contract but as a police regulation pur-

porting to be in compliance with *R. S. Sec.* 3461. Petitioner's claim violates fundamental principles of contractual and statutory construction in that it ignores entirely the obvious intent of the parties as expressed in the ordinance itself and attempts to construct for the parties a fictitious intention in line with the petitioner's requirements in order that it may prevail in this case. The obvious intention of the city authorities was to make a present substantive grant of easement to the partnership, and the grant so made was accepted as such by the partnership. This ordinance was either a valid and complete grant of right of way limited in term, or was a nullity. It neither created nor confirmed any easement rights under *R. S. Sec.* 3461. *State of Ohio ex rel. Martin vs. Ohio Electric Power Co.*, 35 Ohio App. 481, affirmed 121 Ohio State 235 (for opinions in full see Appendix B). It is conceded that the partnership could secure no rights under *R. S Sec.* 3461.

*Queen City Telephone Co. vs. Cincinnati*, 73 O. S. 64.

Petitioner contends that the ordinance of October 7, 1890, was intended to serve two purposes, namely: the grant of a right of way to the partnership and the tender of an agreement under *R. S. Sec.* 3461 to any corporation organized thereunder. If the ordinance is so construed it was invalid under the provisions of *R. S. Sec.* 6494, which provided that no ordinance, resolution, or by-law of a city council should contain more than one subject. This provision is mandatory.

*Bloom vs. Xenia*, 32 O. S. 461;
*Campbell vs. Cincinnati*, 49 O. S. 463;
*Heffner vs. Toledo*, 75 O. S. 413.

If the ordinance of October 7, 1890, was invalid because *ultra vires* the City of Norwalk, there was no agreement between the city and The Incandescent Light & Power Company or The Northern Electric Company under *R. S. Sec.* 3461. If the ordinance constituted a valid enactment and gave rise to a binding contract between the City of Norwalk and The Norwalk Incandescent Light Company, the successors of the partnership became bound by the terms thereof and all rights thereunder expired October 7, 1910.

Petitioner's attempt to stretch the clear provisions of this ordinance into a vague and illusory offer of agreement to corporations not in existence upon the date of its passage illustrates the weak and tenuous nature of petitioner's entire claim of perpetual franchise flowing from the incorporation of The Incandescent Light & Power Company and The Northern Electric Company in 1891 and 1895, respectively. Petitioner apparently recognizes that something more than mere incorporation was necessary to confer easements in the streets of the respondent city upon its predecessors.

Petitioner's assertion that the intention of the partnership to organize a corporation was made known to the Norwalk City Council before the adoption of the ordinance of October 7, 1890, is entirely unsupported by the record. Judge Suhr, the only witness testifying on the point, stated that he had no recollection on the subject (R. 61). His statement appearing on the same page of the record that the partners told the council what they planned to do obviously refers only to the change in the method of distribution of electricity, which re-

quired the adoption of a new ordinance on October 7, 1890, to supersede the ordinance of July 30, 1890, which made the use of the Heisler system of distribution mandatory (R. 61, 35, 36).

To bridge the gap created by the lack of any agreement between the City of Norwalk and the predecessors of the petitioner under *R. S. Sec.* 3461, petitioner suggests that this statute did not require a formal contract between the city and the utility and that only general police regulations from time to time were contemplated thereunder. This contention requires a deletion from the statute of the very definite language contained therein. The petitioner ignores entirely the words "or in case the municipal authorities unreasonably delay to *enter into any agreement.*" We submit that it is clear from the language of the section that a formal contract between the city and the utility is required.

The same contention was urged before and rejected by the Privy Council in *Toronto Electric Light Co., Ltd., vs. Toronto Corporation,* 1917, A. C. 84, affirming 33 Ont. L. R. 267. See especially the opinion of Lord Atkinson, 1917, A. C. at pages 90-91, and the opinion of Chief Justice Meredith, 33 Ont. L. R. at page 277.

See also:

*Potter vs. Calumet Electric Street Railway Co.,* 158 F. 521 (C. C. N. D., Ill., 1908.)

If the section is ambiguous, the ambiguity is certainly to be resolved in favor of the requirement of a formal agreement rather than vague acquiescence or general police power regulation.

*Blair vs. Chicago,* 201 U. S. 400, 471.

Section 3461 must be read with *R. S. Sec.* 1693 which provided the method whereby cities might enter into contracts and agreements. This section reads as follows:

> "Ordinances, resolutions, and by-laws shall require for their passage or adoption the concurrence of a majority of all the members elected, except in case of a single vacancy in the members by death, resignation or otherwise, and such vacancy, by neglect or omission of the council or mayor shall not be filled as provided in section seventeen hundred and thirteen, Revised Statutes, in which case they shall require a majority of the members qualified to vote thereon until such vacancy be filled according to law, and the vote on their passage or adoption shall be taken by yeas and nays and recorded in the journal; *and no contract, agreement, or obligation shall be entered into except by an ordinance or resolution of the council,* nor any appropriation of money for any purpose be made except by an ordinance; every ordinance appropriating money shall contain an explicit statement of the uses and purposes for which the appropriation is made; *the power or authority to make a contract, agreement, or obligation to bind the corporation, or to make an appropriation shall not be delegated;* and every contract, agreement, or obligation, and every appropriation of money made contrary to the provisions of this section shall be void as against the corporation, but binding on the person or persons making it; but this section shall not be construed to impair the power of the board of public works, 'city commissioners,' in any city to make contracts, or impair the power to contract whenever elsewhere given in this title, or to delegate the power to execute such contracts." (Italics ours.)

The strict provisions of Section 1693 as to the method whereby cities might enter into agreements show clearly an intent that vague acquiescence is not to be considered a compliance with the requirement of agreement stipulated in *R. S. Sec.* 3461. The suggestion that no formal agreement is required does not appear in any of the Ohio cases dealing with this section. The requirements laid down in *Queen City Telephone Co. vs. Cincinnati,* 73 O. S. 64 (see especially the opinion of Judge Swing in 5 *O. C. C.* (*N.S.*) 411), for the bringing of an action in Probate Court under *R. S. Sec.* 3461, show that the Supreme Court of Ohio and the Circuit Court in that case regarded a formal agreement necessary to the creation of any rights under that section. An agreement between the City of Norwalk and either The Incandescent Light & Power Company or The Northern Electric Company was obviously impossible in either July or October, 1890, for neither company was then in existence. (Plaintiff's Exhibit 3, R. 282; Plaintiff's Exhibit 6, R. 289.)

It cannot be claimed that the conduct of the city in allowing the operation of the electrical distribution system erected under the ordinance estops the city from asserting that the ordinance did not constitute compliance by the plaintiff's predecessors with the provisions of *R. S. Sec.* 3461. The conduct of the city is plainly referable to what is considered its rights to be under the ordinance and when so considered it cannot be the basis of an estoppel.

*Cleveland vs. Railway Co.,* 93 F. 113 (C. C. N. D., Ohio, 1899), (reversed on jurisdictional grounds, 147 F. 171.)

The estoppel arising from the conduct of the parties under the ordinance of October 7, 1890, operates against the petitioner rather than against the respondent city (*supra*, p. 45).

**3. If the Ordinance of October 7, 1890, Be Considered as Constituting an Agreement With Respect to the Mode of Use of Respondent's Streets Under Revised Statutes Sec. 3461, All Rights Secured Thereunder Expired 20 Years From the Date of Such Ordinance.**

Even if the ordinance of October 7, 1890, be regarded as an agreement between the City of Norwalk and The Incandescent Light & Power Company and The Northern Electric Company as to the use of the streets, alleys, and public places of the city under *R. S. Sec.* 3461, still the easement secured by such agreement was limited in term to twenty years by the express terms of the ordinance. A corporation with the power of eminent domain which enters into an agreement limited in term, granting to it a right of way, certainly cannot claim that it secures thereby a perpetual easement. The argument here advanced by the petitioner was made in *State vs. Central Union Telephone Co.*, 11 O. C. C. 55 (discussed at length, *supra*, p. 70). In denying this contention, Judge Summers says at page 57:

> "The words 'when any lands authorized to be appropriated,' etc., imply that the authority has been previously conferred; but, in our opinion, this is of little if any significance, for the sections are in *pari materia*, and the franchise to so use the streets, conferred by the state, is upon the express condition that the mode of use shall be such as shall be agreed upon between the city and

the company, and in the event they cannot agree, that the Probate Court shall direct in what mode the telephone line shall be constructed along such street. *This clearly contemplates an agreement as to the mode of use prior to any occupancy of the streets by the company, and such agreement with the council or direction by the Probate Court as to the mode of use is inseparable from the right to use the street for telephone purposes, and the right ceases with the expiration of the agreement or direction upon which it is conditioned.*

"We do not understand counsel to claim that the company could have entered upon the streets and erected its poles and strung its wires without an agreement with council or direction in a proceeding in the Probate Court. *If then it enters upon the streets, erects its poles and strings its wires under and by virtue of an agreement between it and the city council, which limits its right to such occupancy to a period of ten years, how can it claim its right still stands when the foundation of it is gone?*" (Italics ours.)

The same question was before the state courts in the *quo warranto* case, *State of Ohio ex rel. Martin vs. Ohio Electric Power Company*, 35 O. App. 481, affirmed 121 O. S. 235. The Court of Appeals said (p. 490):

"If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; *and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction. State ex rel. vs. Central Union Telephone Co.*, 11 C. C. 55, 5 C. D. 311." (Italics ours.)

Likewise the plaintiff trust company in *Louisville Trust Co. vs. Cincinnati*, 76 F. 296 (discussed at length, *supra*, p. 75), argued that the term limitation in the ordinance under which it occupied the streets of the City of Cincinnati was of no effect. In denying this contention of the plaintiff trust company in that case, Judge Lurton says at page 308:

> "The right of the local authority to impose terms and conditions is clearly conferred, and no such corporation can impose itself upon the public streets or highways unless it enter into an agreement touching the occupancy of such streets, or resorts to the right of condemnation in default of an agreement. This right to impose terms and conditions most obviously implies the right to agree upon the duration of such occupancy. The right to exclude altogether, unless resort be had to condemnation, involves the right to limit the period of the grant."

See also:

*Railway Co. vs. Carthage*, 36 O. S. 631 (1881);

*Indianapolis vs. Consumers' Gas Trust Co.*, 144 F. 640 (C. C. A. 7th, 1906);

*Federal Gas & Fuel Co. vs. Columbus*, 96 O. S. 530;

*Weedsport Electric Light Co. vs. Weedsport*, 220 N. Y. 386, 115 N. E. 986 (1917).

The benefit secured by the utilities, in that Probate Court action became unnecessary, is sufficient consideration to support the term limitation contained in the ordinance. In addition a provision limiting the term of

occupation is certainly a reasonable part of a "mode of use" agreement since such term has a direct bearing on all other provisions of such agreement.

**4. The Capacity of Petitioner's Predecessors in Title to Secure Any Easement Under Revised Statutes Sec. 3461 Was Terminated by the Act of April 21, 1896 (92 O. L. 204).**

On April 21, 1896, The Northern Electric Company was operating the electrical distribution system either under an easement limited in term to twenty years from October 7, 1890, or at the sufferance of the city. As we have pointed out, The Northern Electric Company had no vested property right to occupy the streets, alleys, and public places of the City of Norwalk after the expiration of such twenty-year term. On April 21, 1896, the following act of the legislature of Ohio became effective:

"AN ACT

"To amend Section 3471a of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that Section 3471a, as enacted January 26, 1887 (84 O. L. 7), be and the said section hereby is amended so as to read as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the

same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct *or maintain* any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, *without the consent of such municipality;* and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; *but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court.* Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunction or otherwise; *and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal in any circuit court of the state.*

"Section 2. That said Section 3471a shall be and the same hereby is repealed, and this act shall take effect and be in force from and after its passage. * * *"

The effect of this statute was to make *R. S. Sec.* 3461 inapplicable to electric light companies. The statute is clearly intended to apply to companies theretofore incorporated and to existing systems. This intent

is evidenced by the fact that no person or company is to "construct *or maintain*" any electrical distribution system in any street, alley, etc., of any municipal corporation without the consent of such municipality. That it was intended to apply to companies theretofore organized is also shown by the fact that the act expressly excepts rights theretofore secured by proceedings in Probate Court, while expressly including actions then pending in Probate Court or on appeal. The omission of this part of the statute by Petitioner in the quotation appearing at page 56 of its brief is significant since this provision is inconsistent with Petitioner's contention at page 101 that the statute was prospective in operation only and was not intended to affect the rights of electric light companies theretofore incorporated. This statute shows clearly that the legislature of Ohio was of the opinion that the easement to use the streets, alleys, and public places of a municipal corporation did not accrue to an electric light company upon incorporation, for it refers to "rights which have heretofore been received and exercised through proceedings of any Probate Court." It was of course unnecessary to make an express exception of easements, whether limited in term or not, secured through agreements with municipal corporations under *R. S. Sec.* 3461, since such rights were in accord with the provisions of the act.

The effect of the Act of April 21, 1896, was to terminate such inchoate power of eminent domain with respect to securing an easement in the streets of respondent as The Northern Electric Company then had. It is clear therefore that The Northern Electric Company could not assign such right to its successor, The Norwalk

Gas & Electric Company, in 1900 (Ex. 9, R. 296), or to the Ohio Electric Power Company by intermediate assignments. After April 21, 1896, a further grant of easement from the City of Norwalk was necessary before any right to occupy the streets, alleys, and public places of the City of Norwalk, after the expiration of the twenty-year term limitation of the ordinance of October 7, 1890, could be secured by The Northern Electric Company or any of its successors. The consent of the city is required. A proceeding in Probate Court or in a court of equity is not a substitute for such consent.

Respondent's position as to the effect of the Act of April 21, 1896, is sustained by the Supreme Court of the United States in *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173 (affirming *Hardin-Wyandot Co. vs. Upper Sandusky*, 93 O. S. 428). Mr. Justice Clarke says at page 178:

> "This act" (the Act of April 21, 1896) "was a general one, *applicable to all electric lighting companies then operating*, or which might thereafter operate, in the state, and all that it did was to give to the municipal authorities complete control over the placing in the streets of poles and wires for conducting electricity for lighting and power purposes, *instead of the like control* which they had when the franchise was granted, but subject to resort to the Probate Court in case of disagreement with the company as to the 'mode' of using the streets." (Italics ours.)

The Court of Appeals of Huron County in *State ex rel. Martin vs. Ohio Electric Power Co.*, 35 O. App. 481, affirmed 121 O. S. 235, construed this statute in accordance with respondent's contentions. (Opinions in full, Appendix B, *infra.*)

**The Act of April 21, 1896, so Construed Does Not Result in the Impairment of the Obligation of Contract**

The validity of the very statute which we are here considering was before the Supreme Court of the United States in *Hardin-Wyandot Co. vs. Upper Sandusky*, 251 U. S. 173 (1919). The court held that the statute applied to all electric lighting companies then operating, as shown by the quotation from the opinion of Mr. Justice Clarke given above. The act was held valid as a reasonable exercise of the police power.

The act is also valid because it falls within the powers of the legislature of Ohio under Article I, Section 2, and Article XIII, Section 2 of the Ohio Constitution of 1852.

Article I, Section 2, reads as follows:

> "Sec. 2. Where Political Power Vested; Special Privileges.
>
> "All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the general assembly."

Article XIII, Section 2, reads as follows:

> Sec. 2. General Acts of Incorporation.
>
> "Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed. Corporations may be classified and there may be conferred upon proper boards, commissions or officers, such supervisory and regulatory powers over their organization, business and issue and sale of the stocks and se-

curities, and over the business and sale of the stocks and securities of foreign corporations and joint stock companies in this state, as may be prescribed by law. Laws may be passed regulating the sale and conveyance of other personal property, whether owned by a corporation, joint stock company, or individual."

See *Hamilton Gas Light Co. vs. Hamilton City*, 146 U. S. 258, 269.

The question of the right of the State of Ohio to revoke, amend, or curtail the unexercised power of eminent domain of one of its corporate creatures is considered in *Sears, Trustee, vs. City of Akron*, 246 U. S. 242 (1918). In that case the trustee of a bond issue of the Cuyahoga River Power Company brought an action to restrain the City of Akron from using the water of two rivers under an act of the legislature passed in 1912, granting the city the right to divert and forever use such rivers for its water supply. The power company was organized in 1908 under a statute (General Code of Ohio, Section 10128), which provided that the company might enter private lands for the purpose of surveying lands for water power development, and could appropriate such land as was necessary for its development projects. Its articles of incorporation listed the two rivers used by the City of Akron along with one other river as places where the water power of the company would be developed.

The act of the legislature granting the use of the rivers to the City of Akron was passed after the company had made surveys, but before any condemnation proceedings had been completed. The trustee claimed that the action of the city in appropriating the water-

shed constituted an impairment of obligation of a contract between the state and the company which had been assigned to the trustee as security for the bondholders, and that the act of the city constituted a deprivation of the property of the trustee without due process of law.

The bill was dismissed in the District Court upon the ground that the company did not possess any contract right which was impaired. A direct appeal was taken to the Supreme Court of the United States.

Upon the question of impairment of the obligation of the contract, Mr. Justice Brandeis says, at page 248:

> "First. As to the alleged impairment of contract: Plaintiff contends that the incorporation of the company in 1908 under the general laws constituted a contract by which the state granted it the right to construct and operate a power system in the places designated in the certificate and the right to take property for that purpose and to have the water flow past that property uninterrupted and undiminished; and that the ordinance of 1912 is a law which impairs that contract in violation of Article I, Section 10, of the Federal Constitution. It is clear that the contract right created by incorporation alone was not illegally impaired by the ordinance, because there was no contract by the state with reference to the water rights. Incorporation did not imply an agreement that the quantity of water available for development by the company would not be diminished. *St. Anthony Falls Water Power Co. vs. St. Paul Water Commissioners,* 168 U. S. 349, 371. The so-called charter simply conferred upon the company the power to take lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant. If by purchase or by right of eminent domain under the charter powers the company becomes the owner of riparian lands, it acquires the riparian rights of former owners; or it may other-

wise acquire from the owners specific rights in the use and flow of the water. But these would be property acquired *under* the charter, not contract rights expressed or implied in the grant of the charter. Furthermore, the contract inhering in the charter (as distinguished from property acquired under the charter) was subject to the state's reserved power to amend or repeal, as provided in Art. XIII, Sec. 2, of the Ohio Constitution. *Ramapo Water Co. vs. City of New York,* 236 U. S. 579, 583. The Act of 1911, under which the city proceeded, may be treated as an amendment of the company's charter making its rights subject to those of the city, if that is necessary to justify the proceeding of the city, which the act authorized. See *State vs. City of Hamilton,* 47 Ohio St. 52, 74; *Hamilton Gas Light Co. vs. Hamilton City,* 146 U. S. 258; *Berea College vs. Kentucky,* 211 U. S. 45, 57."

As to the alleged property rights of the company, Mr. Justice Brandeis says, at page 249:

"Second: As to the alleged property rights: It follows from what has been said above, that at least until something more had occurred than incorporation, the city was free as against the Cuyahoga Company to appropriate any of the land or any of the water rights which might otherwise have come under the development described in its certificate of incorporation. Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (a) when by resolution the board of directors adopted the plan, or (b) when condemnation proceedings were begun. Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider. For it is clear that Ohio retained the power as against one of its creatures, to revoke any such

right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry. Co. vs. New York State,* 176 U. S. 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. * * *"

A somewhat analogous question was before the Supreme Court of the United States in *Cuyahoga Company vs. Northern Ohio Co.,* 252 U. S. 388 (1920). Mr. Justice McKenna, who wrote the opinion of the court, cites with approval *Sears vs. City of Akron, supra,* and decides the case upon that authority.

In *Adirondack Ry. Co. vs. New York State,* 176 U. S. 335 (1900), Mr. Chief Justice Fuller, who delivered the opinion of the court, says, at page 344:

"Undoubtedly the power to amend or repeal cannot be availed of to take away property already acquired or to deprive a corporation of the fruits already reduced to possession or contracts lawfully made. *But the capacity to acquire land by condemnation for the construction of a railroad attends the franchise to be a railroad corporation, and when unexecuted cannot be held to be in itself a vested right surviving the existence of the franchise or an authorized circumscription of its scope.* * * *" (Italics ours.)

See also:

*Underground Railway Co. vs. City of New York,* 193 U. S. 416 (1904);

*Ramapo Water Co. vs. City of New York,* 236 U. S. 579 (1915);

*Baltimore & Susquehanna R. R. Co. vs. Nesbit,* 10 How. (51 U. S.) 395 (1850).

In view of the authorities cited above, we submit that the Act of April 21, 1896, did not constitute an impairment of obligation of contract or a deprivation of property without due process of law, even though it did revoke such unexercised power of eminent domain as to the streets of the City of Norwalk as The Northern Electric Company had before its passage, and required the consent of the City of Norwalk to the acquiring of any easement in its streets beyond the term of the ordinance of October 7, 1890. No such consent having been secured after October 7, 1910, the petitioner's mortgagor is now occupying the streets of the respondent city at the sufferance of the city and the petitioner is not entitled to the injunction against the ouster of its mortgagor granted by the District Court.

**5. Any Capacity Secured by Petitioner's Predecessors in Title Upon Incorporation to Acquire an Easement by Complying With the Provisions of Revised Statutes Sec. 3461 Was Not Assignable and Is Not Now Held by Ohio Electric Power Company.**

The Incandescent Light & Power Company and The Northern Electric Company secured, upon incorporation, at most, the capacity to acquire an easement in the streets of the City of Norwalk. This was a right of eminent domain rather than a vested property right. This capacity of the respective companies was part of their franchise to be a corporation and as such was not assignable.

Under the law of Ohio the franchise to be a corporation is not assignable.

*Ohio vs. Sherman,* 22 O. S. 411 (1872);
*Shields vs. Ohio,* 95 U. S. 319 (1877).

Moreover, under the law of Ohio the right of eminent domain is a right in furtherance of the franchise to to be a corporation and cannot be disassociated therefrom.

*Coe vs. The Columbus, Piqua and Indiana Railroad Company,* 10 O. St. 372, 389, involved, among other things, the right of a corporation to mortgage its right of eminent domain. The court held that while the Railroad Company in question could mortgage the real property which it had secured by exercise of the right of eminent domain, it could not mortgage the unexercised right of eminent domain. Upon this subject the court says:

> "* * * We certainly can not hold that such a delegation of the power of eminent domain can be made the subject of grant or of sale."

The same question was before the Supreme Court of Ohio in *Atkinson et al. vs. The Marietta & Cincinnati Railroad Company,* 15 O. St. 21. Under the express authority of a special act of the legislature an attempt was made to transfer the properties and franchise, including the right of eminent domain, of an insolvent railroad company to a group of individuals. Judge Ranney says at page 36:

> "* * * It is hardly necessary to add, that a delegation of the power of eminent domain to a corporation as a necessary means to carry into

effect the grant of its franchises, can not be made the subject of either grant or sale. These principles were so fully considered, and explicitly stated, in *Coe vs. The Columbus, Piqua and Indiana R. R. Co.*, 10 Ohio St. Rep. 372, as to require no further comments from us."

*Queen City Telephone Company vs. Cincinnati, supra*, supports our contention that the unexercised capacity of The Incandescent Light & Power Company and The Northern Electric Company to acquire an easement in the streets of the City of Norwalk was not assignable. The court held that in order to bring the action in Probate Court, provided for in *R. S.* 3461, the plaintiff corporation was required to prove proper and complete organization. It is absurd to contend, in view of the court's holding in *Queen City Telephone Co. vs. Cincinnati*, that complete corporate organization was necessary before an action could be brought in Probate Court under *R. S.* 3461, that immediately after proper corporate organization the Queen City Telephone Company could have assigned all its rights and franchises to an individual and could thereby have conferred upon such individual all of the rights and capacities which it secured upon organization in respect to the streets, alleys, and public places of the City of Cincinnati.

In the present case The Incandescent Light & Power Company assigned its property and "franchises" for the benefit of creditors, and the trustees in turn assigned the same to two individuals (Ex. 71, R. 473; Ex. 5, R. 287). If petitioner is correct in its contention as to the assignability of the rights secured by The Incandescent Light & Power Company upon incorporation, George P. Jones

and Mayme C. Foster, on May 7, 1895, secured by assignment the rights which the Supreme Court of Ohio held in *Queen City Telephone Co. vs. Cincinnati,* could only be secured by complete corporate organization.

Another individual, Victor Emanuel (Exs. 14, 14A, 15, 16, 17, and 18, R. 329-342), appears in petitioner's claim of title. Petitioner must likewise claim that he secured the right of eminent domain. It would be as sensible to argue that although complete and proper organization under the law of Ohio was necessary to secure rights under *R. S. Sec.* 3461, still immediately after such organization The Incandescent Light & Power Company or The Northern Electric Company could have conferred full power thereunder on a foreign corporation. (See *Postal Tel. Cable Co. vs. C. C. C. & St. L. Ry. Co.,* 94 F. 234 (C. C. N. D., Ohio, 1899) holding that foreign corporations secured no rights under *R. S. Sec.* 3461.) General Code of Ohio Sections 614-2 and 614-2a cited by petitioner have no bearing on the situation. They relate only to the power of the Public Utilities Commission to regulate public utilities and do not relate to the capacity of individuals to exercise rights such as those here in question.

It is clear that after April 21, 1896, corporations organized for the purpose of distributing electricity, secured by incorporation no rights to occupy the streets, alleys, and public places of municipal organizations under *R. S. Sec.* 3461. Even if the Act of April 21, 1896, did not revoke the capacity of The Northern Electric Company to secure an easement in the streets of the City of Norwalk under *R. S. Sec.* 3461, still such capacity, not being assignable, did not pass to The Norwalk Gas &

Electric Company on May 8, 1900, under the deed conveying the electrical distribution system of The Northern Gas & Electric Company (change of name from The Northern Electric Company) to that company (Ex. 9, R. 296). The Norwalk Gas & Electric Company, having been incorporated April 20, 1900 (Ex. 8, R. 294), secured no such capacity by incorporation. It follows that the Ohio Electric Power Company, petitioner's mortgagor, as assignee of the Norwalk Gas & Electric Company by intermediate assignments, has no capacity to secure or exercise an easement in the streets of the City of Norwalk under *R. S. Sec.* 3461.

*Ohio Public Service Co. vs. State ex rel. Fritz,* 274 U. S. 12 (1927), and the other cases cited by petitioner upon this subject are to be distinguished from the present situation, for in all such cases the right held to be assignable was the vested easement arising from a municipal franchise ordinance unlimited in term rather than the unexercised right or capacity of eminent domain. Such cases should be compared with *Shields vs. Ohio,* 95 U. S. 319, which holds that upon consolidation of railroad companies under the statutes of Ohio, the resulting company takes only the corporate franchise rights granted to a company incorporated at the time of the consolidation and does not secure the corporate franchise rights which belonged to the companies which were parties to such consolidation. One of the transfers in the chain of title of the Ohio Electric Power Company to the electrical distribution system in the City of Norwalk was by agreement of consolidation (Ex. 12, R. 313). This consolidation was under the same statutory provision as the one before the court in *Shields vs. Ohio, supra.* The con-

solidated company, The Cleveland, Southwestern & Columbus Railway Company, upon coming into existence, secured only the rights accruing to corporations organized for the distribution of electricity on February 5, 1907. Such rights did not include the power of eminent domain as to the streets of municipalities granted by *R. S. Sec.* 3461.

**6. The Ordinance of July 1, 1924, Has No Bearing Upon This Case. It Does Not Constitute a Grant of Easement or an Agreement of Any Sort**

A large part of the evidence introduced by the petitioner at the hearing of this case dealt with the ordinance of the City of Norwalk of July 1, 1924 (Petitioner's Exhibit 38, R. 438), and the conduct of the city officials thereunder (see Petitioner's Exhibits 51 to 69, inclusive, R. 457-471). The title and first section of the ordinance are as follows:

"CONSTRUCTION AND MAINTENANCE OF ELECTRIC LIGHT AND POWER WIRES

AN ORDINANCE

"Be it ordained by the Council of the City of Norwalk, Ohio, three-fourths of all members elected thereto concurring, as follows:

"Section 1. That all electric light and power wires, telephone, signal and trolley wires in operation in the corporate limits of the City of Norwalk, Ohio, shall be constructed and maintained in accordance with the following specifications, in regard to clearances, spacing, heights and positions.

> Duplicate pole lines shall be avoided where possible and safety of the public and workmen must be given first consideration in constructing all lines."

The ordinance proceeds to make detailed provisions with regard to specifications for poles, wires, cross-arms, etc. No companies or individuals are specifically referred to in the ordinance.

At the time of the passage of this ordinance The Cleveland, Southwestern Railway & Light Company was operating the electrical distribution system now operated by the Ohio Electric Power Company. There were then at least eight other companies having wires carrying electricity within the city (Preston, R. 178). The ordinance is still in effect (Answer to Third Amendment and Supplement to Bill of Complaint, R. 47).

This ordinance was apparently injected into this case by the petitioner by the filing of the third amendment and supplement to the bill of complaint on the day that the final hearing commenced (R. 46), in the hope that it might bolster up a fatal weakness in its case, namely, the absence of any grant of easement beyond October 7, 1910, the date of the expiration of the municipal franchise ordinance. Petitioner claims that this ordinance constitutes "a consent by said city to the use of its streets and public ways and an agreement as to the mode of such use by the Ohio Electric Power Company and its several predecessors." (R. 46.)

We submit that the ordinance of July 1, 1924, is entirely immaterial and irrelevant to the issues of the case. The ordinance on its face clearly indicates that it is not in any sense an agreement between the city and any of the various companies then having wires carrying elec-

tric current within the city. It certainly cannot be construed to the consent to the use of the streets of the city required by the Act of April 21, 1896. (*R. S. Sec.* 3471a, now *G. C.* 9193 *and* 9194.)

As we have heretofore shown, it is only under that statute that an easement or franchise to use the streets could be secured by The Cleveland, Southwestern Railway and Light Company or the Ohio Electric Power Company in July, 1924, or thereafter. The Cleveland, Southwestern Railway and Light Company and the Ohio Electric Power Company have no rights under *R. S. Sec* 3461, because both companies were incorporated after April 21, 1896.

The ordinance of July 1, 1924, was obviously passed by the City of Norwalk under the express grant of power contained in G. C. Sec. 3637 (see Appendix A, *infra*), and is in no way referable to *R. S. Sec.* 3461. It is not an agreement or an offer of any agreement. It is not a grant of easement. It is solely an unilateral act on the part of the City of Norwalk for the protection of human life and for the public welfare.

The Ohio Electric Power Company is subject to the provisions of this ordinance, whether it occupies the streets of the city under a perpetual franchise as claimed by petitioner, or at the mere sufferance of the city as claimed by the respondent. The city in either case has inherent power to enact the regulations contained in the ordinance and to enforce them against any companies or individuals maintaining wires carrying electric current.

In *Cincinnati vs. Diamond Light Co.*, 4 O. App. 177, (Motion to Certify Overruled, 12 O. L. R. 576), the light company claimed that a similar ordinance of the City of Cincinnati constituted a grant to it of the right to lay

conduits in the streets of the city. The Court of Appeals of Hamilton County denied such contention, saying at page 184:

> "Defendant also claims that the enactment by council of the general ordinance, No. 4285, providing general terms and conditions regulating the business of electrical illumination within its corporate limits, has in effect provided a general consent to all such companies and exhausts the subject of regulations and conditions, and that any company can, by observing the terms of such ordinance in all particulars, carry on such business with all necessary rights in the public highway. This ordinance is found as Section 647, on page 265 of the Code of Ordinances of Cincinnati (1910-1913), and also appears at page 407 of the Code of Franchises of the City of Cincinnati (1914). It lays down general provisions which shall be applicable to all such companies, and the first paragraph of the ordinance shows, in its terms, that it is not inteded to be a general grant to all companies, but simply states general provisions that shall apply to special grants. The opening paragraph is as follows:
>
> "'That whenever permission is by ordinance granted to any person, company or corporation to engage in the business of electrical illumination, it shall be under the following express terms and conditions.'
>
> "This ordinance would not prevent council, in making any particular grant, from imposing any other provisions and conditions not found therein in addition to or different from those of the ordinance. This ordinance can not be construed as granting a consent to the defendant company within the terms of the statute."

See also:

*Laighton vs. City of Carthage, Mo.*, 175 F. 145.

**7. All Rights of Petitioner's Predecessors in Title Became Terminated on the Expiration of the Public Lighting Agreement of April 13, 1905.**

The contract of April 13, 1905, between the City of Norwalk and The Cleveland and Southwestern Traction Company (Ex. H, R. 541), terminated as of August 31, 1915 (the expiration date of such contract), any and all rights to occupy the streets of the City of Norwalk which The Incandescent Light & Power Company or any of its successors may have had.

This contract provided for the lighting of the streets of the city with arc lights, and the lighting of the public offices and buildings of the city with incandescent lights for ten years, beginning September 1, 1905. The electrical distribution system erected by The Norwalk Incandescent Light Company, and now operated by the Ohio Electric Power Company, was used for these purposes (Petitioner's Exhibit 1, R. 277). The contract contains detailed provisions as to the duties of the company and of the city. Section 14 of the contract provides as follows:

> "14. Said contractor shall have the right to the reasonable and necessary use and occupation of the streets and other public places in said city for the purpose of erecting, operating and maintaining its said lamps, wires, poles and apparatus, but in such use of said streets, alleys, and other public places said contractor shall be under the control of said city, and shall obey all reasonable and proper restrictions and limitations imposed by said city upon said use, provided, however, that nothing herein contained shall warrant the construction that said city may by such restrictions and limitations impair the obligation of this con-

tract or prevent said contractor from carrying out the same, and provided further that nothing herein contained shall permit said use or occupation of said streets, alleys and other public places after the expiration of this contract, to-wit: August 31, 1915, or shall prevent the said city from revoking said contractor's right to the use of said streets, alleys and other public places, for any reason for which a forfeiture may be declared against said contractor, or its assigns hereunder, or from revoking the grant of said rights for non-user or misuser thereof through failure of said contractor or assigns to furnish such street, *commercial and residence lighting* to the said city, and *the residents and inhabitants thereof,* or otherwise.

"The said contractor, at the expiration of this contract, shall, upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after thirty days' notice from said city the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

The contract uses the broadest language possible in stating the obligation of the company to remove its equipment from the streets upon its expiration. The express reference in the last lines of the first paragraph of Section 14 to the commercial and residence lighting service furnished the residents and inhabitants of the city shows clearly that the parties had in mind the entire distribution system of the company and not, as petitioner contends, merely the street lighting equipment. Commercial and residence lighting service is, also, dealt

with in Section 15 of this contract. There was only one system of poles which carried alternating current wires for incandescent lighting for both the city and private individuals, and direct current wires for the street lighting. (Ex. 1, R. 277; R. 57; 58.) Compliance with the provisions of the public lighting contract with regard to removal of equipment used by the company thereunder would require removal of the whole equipment of the company in the city.

The obligation of the company to remove its equipment from the streets was absolute and not merely an option to be exercised by the city within a reasonable time. The obligation is stated in positive language and the provision for request by the city is merely an express statement of the legal requirement that a tenant at sufferance is entitled to notice before he can be forced to vacate. The provision for thirty days' notice is inserted for the benefit of the company and has no effect upon the situation; except that after such notice and failure of the company to comply therewith, the city is authorized to remove the company's equipment and to charge to the company the cost of such removal. The resolution of March 23, 1926 (Petitioner's Exhibit 42, R. 445), requesting removal of the system of the Ohio Electric Power Company within thirty days, satisfies any requirement of notice under the public lighting contract.

This contract constitutes a recognition by the company that it had no rights to occupy the streets of the city with its equipment after August 31, 1915, and also constitutes a termination of any rights which it might have had thereafter. An express reference to the alleged perpetual franchise arising from the incorporation of

predecessor companies between 1887 and 1896 is not necessary to effect the waiver and cancellation thereof, in view of the broad and all inclusive language of Section 14. The provisions of Section 14 constitute a cancellation of such claim by novation, even if the company at that time were ignorant of the existence of a claim of a perpetual franchise.

In *Toronto Electric Light Co. vs. Toronto,* 33 Ont. L. R. 267, affirmed 1917, A. C. 84, similar public lighting contracts were held to make the light company a tenant at sufferance of the municipality after the expiration of the term thereof.

If The Cleveland and Southwestern Traction Company had any rights to occupy the streets at the time of entering into this contract, whether perpetual or limited in term, such rights became by this contract limited in term to August 31, 1915, and since the petitioner's claim of perpetual franchise is through The Cleveland and Southwestern Traction Company, it is bound by the agreement of that company to take all the poles, wires, and other apparatus and material of every kind and description from the streets, alleys, and other public places of the city upon the request of the city. The Court of Appeals of Huron County so held in *State ex rel. Martin vs. Ohio Electric Power Co.,* 35 O. App. 481. The Supreme Court of Ohio took the same position in *Ohio Electric Power Co. vs. State ex rel. Martin,* 121 O. S. 235. The court says at page 240:

> "That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited"

(referring to the street lighting contract of April, 1905, between the City of Norwalk and The Cleveland and Southwestern Traction Company) "and it could not thereafter convey something which it no longer possessed."

See also

*Cleveland Electric Ry. Co. vs. City of Cleveland*, 137 F. 111, 118.

The fact that The Cleveland, Southwestern and Columbus Railway Company, at or about the time of the expiration of this contract, sought a new franchise to use the streets of the city for its electrical distribution system is further evidence to support the foregoing construction of the contract of April 13, 1905. (R. 135, R. 136, R. 137, R. 201, 202.)

Petitioner urges that respondent is now estopped from asserting the provisions of the contract of April 13, 1905, as a defense to petitioner's claim of a perpetual franchise. This claim of estoppel is based upon the doctrine of *Railroad Company vs. McCarthy*, 96 U. S. 258, that where a party gives one reason for its conduct or decision, it cannot, after litigation is begun, change its ground and put its conduct upon another basis. It is claimed that, in ordering the Ohio Electric Power Company from its streets by resolution of March 23, 1926 (Petitioner's Exhibit 42, R. 445), and in requesting the prosecuting attorney of Huron County to bring proceedings to oust such company from the streets of the City of Norwalk by resolution of the city council of May 13, 1926 (Petitioner's Exhibit 45, R. 449), the city did not expressly rely upon the contract of April 13, 1905.

The grounds for ouster stated in the two resolutions are that the Ohio Electric Power Company had neither a city nor a state granted right to occupy the streets of the City of Norwalk. The city is now merely urging that one of the reasons why the Ohio Electric Power Company and the petitioner do not now have either a city or a state granted right to use the streets of the city is that their predecessor, The Cleveland and Southwestern Traction Company, entered into the contract of April 13, 1905. "Even in the law the whole generally includes its parts." (Mr. Justice Holmes in *Western Union Telegraph Co. vs. Kansas,* 216 U. S. 1, 53.)

Even if it should appear that there has been a shift of position by the city between 1926 and the present, the petitioner can show no prejudice to itself or to its bondholders. Petitioner rests its whole case upon the contention that its rights and the rights of its bondholders became fixed prior to the adoption of the resolutions referred to by petitioner's counsel. There has been no change of position by petitioner or Ohio Electric Power Company since March 23, 1926, the date of the council resolution in question. This case comes within the exception referred to in *Spitzer vs. Board of Trustees,* 267 F. 121, 128, that the doctrine of *Railroad Company vs. McCarthy* does not apply where there has been no prejudice by the failure of the adverse party to assert the defense in question at the time of the earlier statement of position.

### D. The Respondent Is Not Estopped to Deny That Petitioner's Mortgagor, the Ohio Electric Power Company, Has a Continuing Right to Use Its Streets, Alleys, and Public Places

Petitioner contends that the City of Norwalk is estopped by its conduct to deny the existence of a continuing right in the Ohio Electric Power Company to occupy the streets, alleys, and public places of the city. This contention is apparently based upon the following:

1. The action of the city in allowing the construction of an electrical distribution system by The Norwalk Incandescent Light Company in 1890.

2. The action of the city in acquiescing in the construction of a new generating plant by The Northern Electric Company in 1895.

3. The action of the city in acquiescing in the continued operation of the electrical distribution system of The Norwalk Incandescent Light Company and the generating plant constructed by The Northern Electric Company and by their various successors, including the Ohio Electric Power Company.

4. The action of the officials of the City of Norwalk in enforcing the ordinance of July 1, 1924, as against The Cleveland, Southwestern Railway & Light Company and its successor, the Ohio Electric Power Company.

A review of the facts as to the conduct of the city is necessary.

## 1. Construction of Electrical Distribution System by The Norwalk Incandescent Light Company

The electrical distribution system now operated by the Ohio Electric Power Company was originally constructed between July and October, 1890, by The Norwalk Incandescent Light Company, the partnership. It was constructed under the ordinance of July 30, 1890 (Exhibit A, Second Amendment and Supplement to Bill of Complaint, R. 35), and the ordinance of October 7, 1890 (Exhibit B, Second Amendment and Supplement to Bill of Complaint, R. 36). These ordinances were enacted at the request of the partnership and the grant contained therein was accepted by the partnership. (R. 52, 53, 62.) They were limited in term to twenty years. The only possible claim of estoppel that can arise as the result of the action of the city in allowing the construction and the operation of the electrical distribution system of The Norwalk Incandescent Light Company is that the city is estopped to deny the validity of the easement granted by the ordinances. Such estoppel can create no rights after October 7, 1910, the date of expiration of the twenty-year term.

In *Cleveland vs. Railway Co.*, 93 F. 113 (C. C. N. D., Ohio, 1899)—(reversed on other grounds, 147 F. 171, C. C. A. 6th)—the fourth and fifth paragraphs of the syllabus read as follows:

> "4. Etoppel—Acts *in Pais*—Construction of Party's Conduct. The conduct of a party, sought to be made the basis of an estoppel against him, must be viewed in the light of the understanding he then had of his rights, and not in the light of such rights as they may be thereafter determined.

"5. Same—Acts of City. In 1849 the City of Cleveland entered into a contract with certain railroads, by which it granted them the right to use a portion of a tract of land claimed as a street. Not long afterwards, in a suit against the railroads by an adverse claimant, the defendants alleged their interest in the land to be that of licensees of the city, and successfully defended on the city's title under a prior dedication. Held, that the city, by permitting the railroads to remain in undisturbed, or even exclusive, possession of the ground for 45 years, and to expend large sums in the construction of improvements thereon without objection, was not estopped, as against them, to claim any rights in the property consistent with the contract, according to the construction and meaning given it by the defendants in their pleading in the former suit, where they had never given notice of any other or different claim."

(See also page 126 of the opinion for the identical language.)

## 2. Erection of Generating Plant in 1895

The Northern Electric Company erected a new generating plant in 1895. Some of the equipment used in the generating plant of The Norwalk Incandescent Light Company was moved to the new building and some new equipment was purchased. (R. 68.) This plant is now used by the Ohio Electric Power Company for standby or emergency service. The equipment placed in the plant in 1895 is still in use. (Iasull, R. 123.) The plant itself is now in a state of disrepair. (Ex. A, R. 521.)

On July 16, 1895, The Northern Electric Company and the City of Norwalk entered into a contract for public lighting. (Ex. G, R. 534.) In consideration of the agreement of the city to purchase street lighting and

lighting for the public buildings from the company, the company agreed in part as follows:

> "In further consideration of the premises, said company further covenants and agrees with said city that for the purpose of furnishing power and generating electricity for said arc and incandescent lights, it will build and construct in said city and during said period of ten (10) years will continuously keep in operation a first-class electric light plant, which shall consist of a brick and stone building of sufficient size and convenient construction, with a brick smoke-stack, to be equipped during all of said period with all the modern appliances for furnishing and maintaining good, regular, continuous and satisfactory lighting service; that said plant shall contain during all of said term of ten years, arc dynamos of a total capacity of at least one hundred and fifty regular electric arc lights, and boilers and engines of at least double the amount of power necessary to furnish electricity for and keep in operation all the arc lamps used in said city for such public lighting; and that all of the machinery contained in and about said plant and connected therewith shall be of the best and most improved pattern and kind and shall be kept in as good repair and condition as new, natural wear and tear excepted."

The generating plant constructed by The Northern Electric Company in 1895 was built in performance of the obligation of the company under the public lighting contract. It therefore is clear that no estoppel against the city can arise from the performance of the contractual obligation of the company.

### 3. Operation of Distribution System from October 7, 1910, to March 23, 1926

The electrical distribution system originally constructed by The Norwalk Incandescent Light Company was operated between October 7, 1910, the date of the expiration of the franchise ordinance of October 7, 1890, and March 23, 1926, the date of the resolution of the council of the City of Norwalk requesting the Ohio Electric Power Company to vacate the streets of the city of Norwalk (Petitioner's Exhibit 42, R. 445). During this period a number of companies were in possession of the system. The petitioner claims that large expenditures were made during this period.

#### (a) 1910-1915

The occupation of the streets of the city by the predecessors of the Ohio Electric Power Company between October 7, 1910, and September 1, 1915, is clearly referable to the public lighting contract between the city and The Cleveland and Southwestern Traction Company, which expired on the latter date. (Ex. H, R. 541.) As a practical matter, the City of Norwalk could not have forced the various companies operating the system during this period to vacate its streets, for the reason that under this contract the respective companies had the right to occupy the streets for public lighting purposes. It is to be remembered that there was only one system of poles supporting wires for incandescent lighting and for arc lighting. (Ex. 1, R. 277; R. 57, 58.) The incandescent lighting was furnished to both the city and pri-

vate individuals. (Ex. H, Section 13, R. 547.) The arc lighting was used only by the city.

The acquiescence of the city in the operation of the electrical distribution system now operated by the Ohio Electric Power Company during the period from October 7, 1910, to September 1, 1915, cannot be treated as an admission by the city that any perpetual rights existed and cannot be relied upon by the companies, in view of the fact that they were charged with notice by the express provisions of Section 14 of the contract of April 13, 1905 (Ex. H, R. 541), that the city considered the rights of the company to be at an end upon the expiration of such contract.

The conferences between the city officials and the representatives of The Cleveland, Southwestern & Columbus Railway Company, prior to the expiration of the public lighting contract, make it clear that the city took the position that the company was without right to occupy its streets after September 1, 1915. The evidence also shows that the company acquiesced in this position of the city. (R. 135, R. 36, R. 137, R. 201.)

### (b) 1915-1926

The municipal electric light and power plant was constructed in 1915. The record shows that the city took no action to evict the distribution system of the private companies from its streets until March, 1926. On March 23, 1926, the city council passed a resolution ordering the Ohio Electric Power Company from the streets. The question arises whether under these circumstances an estoppel can be based upon the acquiescence of the city between September 1, 1915, and March 23, 1926, in the

continued occupation of its streets by the private distribution system. At the outset it is to be observed that during this period no claim of any franchise right, perpetual or otherwise, was ever made by any of the companies occupying the streets of the city; nor was any affirmative action taken by the city suggesting a recognition of any franchise rights. The case is one of complete inaction and silence by both parties.

There is no evidence in the record in this case of any expenditures, either for repairs or for extensions to the private distribution system, between September 1, 1915, and March 23, 1926. Mr. Taylor testified that during the period that he was identified with the company, from 1910 to 1916, the company spent between twenty and twenty-five thousand dollars in repairs and replacements. The whole burden of his testimony would indicate that the property was in a very bad state of repair when he came to Norwalk in 1910; and that it was at that time immediately necessary to make repairs so that the property could be operated with reasonable efficiency and economy and so that the company then operating the property could fulfill the obligations of its public lighting contract with the city. (R. 77, 78.) The evidence bearing upon the breakdown of the private lighting system during this period supports this inference. (R. 202, R. 137, R. 192, 193.) Mr. Taylor made no statement concerning expenditures after September 1, 1915. Mr. Taylor's connection with the property extends to 1916, although he was not in active charge after 1913. (R. 77, 78.) Petitioner did not offer any evidence allocating the expenditures made during Mr. Taylor's connection with the property, and his testimony therefore does not support a

claim of any expenditures upon the property after September 1, 1915.

The only other evidence as to the amount of expenditures upon the property is that of Mr. Turkle, who managed it from 1925 to 1928. He testified that in his opinion the company spent, during that period, between eighteen and twenty thousand dollars on maintenance and repairs (R. 99, 94). There is no showing anywhere in the record of any expenditure prior to March 23, 1926, when the city unequivocally declared its position. The burden being upon the petitioner in this regard, the petitioner has failed to prove its case.

The main expenditure upon the property during Mr. Turkle's management was the rebuilding of the company's line on Main Street in the City of Norwalk. This occurred in 1927 while the *quo warranto* suit was pending, and over the vigorous protest of the Director of Public Works of the city. (R. 96, 99; Ex. 64, R. 467.)

The evidence bearing upon expenditures between 1910 and 1916 and between 1925 and 1928 fails to show that anything more than ordinary maintenance and repairs were made, with the possible exception of the rebuilding of the line on Main Street which took place after the city had declared its position. The Ohio Electric Power Company representatives at the time claimed that it was merely a repair operation. Such maintenance and repair work was necessary to keep the private distribution system operative. There is no evidence of any capital investment between 1910 and 1928.

It is scarcely controversial under the evidence that the electrical distribution system which the Ohio Electric Power Company is now operating in the streets of the

City of Norwalk is in a sad state of disrepair. (Spengler, R. 171; R. 151-153; Exs. K, O, R. 554-558.) Far from being a modern and efficient system, it is a menace to the safety of the citizens of Norwalk.

The present condition of the system establishes that no great expenditures have been made upon it to the prejudice of the Ohio Electric Power Company. The equipment in the generating plant dates back to 1890 and 1895. (Compare description of machinery in original plant in Ex. 5, R. 287, with description of machinery in present plant, Exhibit D, R. 525; see also Insull, R. 122, 123.)

### 4. The Conduct of the City Under the Ordinance of July 1, 1924

On July 1, 1924, the City of Norwalk enacted an ordinance relating to the construction and maintenance of electric light and power wires (Ex. 38, R. 438). This ordinance affected all companies operating wires carrying electricity within the city. The plaintiff contends that by enforcing this ordinance against the Ohio Electric Power Company, the city is estopped to claim that such company does not have a continuing right to operate in the streets of the city. We submit that this ordinance, which was passed under the general police powers of the city, was properly enforced against any individual or company operating in the city whether the company was operating under a franchise or was using the streets of the city at the sufferance of the city. The fact that the Ohio Electric Power Company has no right to use the city streets does not give it a permissive right to endanger the lives and safety of the citizens of the city.

The first order made by any representative of the City of Norwalk under this ordinance is Exhibit 51, a letter dated May 14, 1925. (R. 457.) The last act of the city under the ordinance prior to the resolution of March 23, 1926 (requesting the Ohio Electric Power Company to remove its equipment from the streets of Norwalk), is contained in Exhibit 60, a letter of November 19, 1925. (R. 464.) Exhibits 51 to 60, inclusive, show that the only action of the city under this ordinance, so far as the Ohio Electric Power Company was concerned, was to order the removal of certain unused wires of the Ohio Electric Power Company. Orders to remove do not constitute an admission of a continuing right to use the streets.

### 5. Assessment of Taxes

Petitioner at page 88 of its brief contends that the assessment of taxes upon the property of Ohio Electric Power Company and its predecessor furnishes a basis for an estoppel against respondent. The taxes in question were real and personal property taxes, not franchise taxes. (Exhibit 1, R, 279.) Such taxes would be assessable and payable regardless of whether the utility had any continuing easement in the streets of respondent. Such taxes were assessed by the Tax Commission of Ohio upon the basis of a report made by the company. (See Physical Exhibit C.) The respondent had nothing to do with the assessment of such taxes and had no standing to object to such assessment. Clearly there has been no inconsistent action with respect to taxes which can furnish any basis for estoppel against respondent.

## 6. Authorities on Estoppel

In summary, an estoppel *in pais* can only arise where the conduct of the party against whom the estoppel is asserted is tantamount to fraud, or where its action or silence induced the other party to act to his prejudice or injury. The City of Norwalk has at no time by its conduct led The Norwalk Incandescent Light Company or any of its successors, including the Ohio Electric Power Company, to believe that they, or any of them, had any continuing right to occupy the streets of the city after September 1, 1915. No such claim of continuing right was ever made by the Ohio Electric Power Company or any of its predecessors prior to the filing of the answer in the *quo warranto* suit. The petitioner has not shown that the Ohio Electric Power Company or any of its predecessors predicated such expenditures as were made upon an admission of the city, by silence or otherwise, that the companies had a continuing right to occupy its streets.

The Supreme Court of Ohio and the Court of Appeals have expressly held that no estoppel can be asserted against the city under the facts of the present case. The only evidence before this court which was not before the state courts is the ordinance of July 1, 1924, and the action of the city thereunder. We submit that such evidence has no bearing upon the question of estoppel. The Supreme Court of Ohio said in *Ohio Electric Power Co. vs. State ex rel. Martin,* 121 O. S. 235:

> "Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of

ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding."

The mere fact that the successors of The Norwalk Incandescent Light Company continued to occupy the streets, after the expiration of the franchise, without any understanding or agreement with the city, can create no new rights, particularly in view of the fact that the longer the city permitted the utility to transact business, the greater was the advantage to the utility.

In *Toronto Electric Light Co., Ltd., vs. Toronto*, 1917 A. C. 84, affirming 33 *Ont. L. R.* 267 (cited *supra*, p. 94), the electric light company had maintained its electrical distribution system in the streets of Toronto for over forty years without interference by the city. The company claimed that the acquiescence of the city in such continued occupation of the streets, estopped the city from denying that the company had a continuing right to operate therein. Injunction against removal of poles, etc., by the city was denied. Lord Atkinson, giving the judgment of the Privy Council, says at page 99:

> "No estoppel arises in this case, as there is no evidence whatever that both the contracting parties were not fully aware of their respective legal rights. It may well be that the appellant company never anticipated that the respondents would insist upon the removal of posts carrying wires, erected with their implied consent but not in pursuance of any formal agreement. With the hardships (if any) or the moralities of the case this board has no concern. It deals with the legal rights of the parties and those alone, and, having regard solely to them, their lordships are on the whole case of opinion that the judgment appealed from was right and should be affirmed and this appeal be dismissed, and they will humbly advise His Majesty accordingly. * * *"

Chief Justice Meredith of the Appellate Division of the Supreme Court of Ontario says in 33 *Ont. L. Rep.* 267, at page 284:

> "Now, in order to raise an estoppel the person who sets it up must have been mistaken as to his own legal rights and must have expended money or done some act on the faith of his mistaken belief; and the person against whom the estoppel is set up must have known of his own rights and of the other person's mistaken belief, and must have encouraged him in his expenditure of money or other act, either directly or by abstaining from asserting his legal right: Halsbury's Laws of England, Vol. 13, p. 167, para. 201."

*Louisville Trust Co. vs. Cincinnati,* 76 F. 296, 316 (C. C. A. 6th, 1896);

*City of Detroit vs. Detroit City Railway Co.,* 60 F. 161, 166 (C. C. Mich.—Opinion by Taft, Circuit Judge—1894).

In a very similar case to the one at bar, *Selkirk vs. Selkirk Electric Light Co.,* 20 Manitoba Rep. 461, the court said as to the claim of the utility company that the town was estopped from denying the rights of the utility company in the streets of the town (p. 469):

> "The company cannot complain if the town has permitted them to continue for a number of years after its rights had ceased; the longer they were permitted to transact business, the greater the advantage to them; and no expenditure of any magnitude has been made by the company and none of a stable or permanent character or other than necessary for its requirements in carrying on its business."

In *Milwaukee vs. Milwaukee Electric Railway & Light Co. et al.*, 173 Wis. 400, 180 N. W. 339, it was held:

> "The fact that it" (an interurban street railway company) "has for a considerable period of time, upwards of twenty years, the court found, acquiesced in such use" (use of the city's streets without franchise from the city) "does not estop it" (the city) "from now asserting its claim. * * * The use of the streets by the defendant without a franchise where one is needed constitutes a continuing trespass. As against the city in its governmental capacity or as against the public, the continuing trespass, if any, has not ripened into a right."

In *Laighton vs. City of Carthage, Mo.*, 175 F. 145, the court held that continued operation by the company after the expiration of its franchise did not give rise to an obligation upon the company to continue to serve. Upon this point, the court says at page 149:

> "As this postulate is conditioned upon the implied continued contractual relation, as in the case of a mere license, either party may at will withdraw therefrom and put an end to it. Were the law otherwise, it would be in the power of a mere licensee to perpetuate indefinitely an expired franchise, and it would be in the power of the grantor to compel continued service indefinitely from one under no contractual obligation to render service."

In the cases cited by petitioner to support its claim of estoppel, the municipal corporations were fully familiar with the claims of the utilities. In each case, there were large investments made by the utility on the basis of such claim of franchise right. Neither a continuing claim of franchise right brought to the attention of the respondent nor large expenditures in capital im-

provements based thereon have been shown in the present case. The facts here furnish no basis for the estoppel urged by the petitioner and bring this case clearly within the authorities denying such an estoppel cited above.

## CONCLUSION

We respectfully submit:

1. That the Circuit Court of Appeals properly held that the record showed no circumstances justifying equitable interference with the state court *quo warranto* proceedings.

2. That Petitioner has no continuing right to have its Mortgagor, Ohio Electric Power Company, occupy the streets of Respondent City.

The decision of the Circuit Court of Appeals should, therefore, be affirmed.

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# APPENDIX A

## Statutes of Ohio

### 1. Collection of Statutes of Ohio Relating to Public Utility Easements in the Streets of Municipal Corporations

The first general incorporation act in Ohio was passed May 1, 1852. We quote only those portions thereof relating to easements in the streets of municipal corporations:

**Act of May 1, 1852, 50 O. L. 274**

"AN ACT
To provide for the creation and regulation of incorporated companies in the State of Ohio

WHO MAY BECOME A BODY CORPORATE

"Sec. I. Be it enacted by the General Assembly of the State of Ohio, that any number of natural persons, not less than five, may become a body corporate, with all the rights, privileges and powers conferred by, and subject to all the restrictions of this act.

"TO CREATE AND REGULATE RAILROAD COMPANIES

" * * *

OCCUPATION OF STREETS, PUBLIC GROUNDS, ETC.

"Sec. XII." (R. S. 1880, Sec. 3283.) "If it shall be necessary, in the location of any part of any railroad, to occupy any road, street, alley or public way, or ground of any kind, or any part thereof, it shall be competent for the municipal or other

corporation or public officer or public authorities, owning or having in charge thereof, and the railroad company to agree upon the manner and upon the terms and conditions upon which the same may be used or occupied; and if said parties shall be unable to agree thereon, and it shall be necessary in the judgment of the directors of such railroad company to use or occupy such road, street, alley, or other public way or ground, such company may appropriate so much of the same as may be necessary for the purposes of such road, in the same manner and upon the same terms as is provided for the appropriation of the property of individuals by the tenth section of this act: Provided, that every railroad company laying down any such track or tracks, upon any such public street, road, alley or other public ground, shall be responsible for injuries done to private property by such location, lying upon or near to such public ground, which may be recovered by civil action brought by the owner or owners, at any time within two years from the completion of such track or tracks, before the proper court." (Amended April 15, 1857, 54 *O. L.* 133, by addition of proviso.) (For present analogous provisions, see G. C., Sections 8763-8766.)

* * *

## "TO CREATE AND REGULATE MAGNETIC TELEGRAPHIC COMPANIES

### How Telegraphic Corporations May Be Created

"Sec. XLIV. That whenever any number of persons, as required by the first section of this act, associating to form a company, for the purpose of constructing any line or lines of magnetic telegraph, they shall, under their hands and seals, make a certificate, which they shall specify as follows: First, the name assumed by such company and by which it shall be known; second, the ter-

mini of said line or lines, and the counties through which the same shall pass; third, the amount of capital stock necessary to construct said line or lines of telegraph, and the amount of each share; such certificate shall be acknowledged, certified, and forwarded to the secretary of state, recorded and copied in the same manner as provided in the second section of this act for the incorporation of railroad companies; and when so incorporated, are hereby authorized to construct a line or lines of magnetic telegraph, as may be named in their certificate of incorporation, and by the name and style provided in said certificate shall be deemed a body corporate, with succession, and they and their associates to have the same general powers, as is provided in the third section of this act, and shall be subject to all the restrictions hereafter provided.

" * * *

APPROPRIATION OF ROAD

"Sec. XLVII." (R. S. 3454.) "The corporation hereby created, is authorized to construct said telegraph line or lines, from point to point, along and upon any of the public roads, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires: Provided, that the same shall not incommode the public in the use of said roads or highways." (For present analogous provision see G. C. Sec. 9170.)

* * *

"TO CREATE AND REGULATE GAS LIGHT AND WATER COMPANIES

" * * *

POWERS OF GAS COMPANIES

"Sec. LIII. Any corporations formed under this act shall have full powers, if a gas company, to manufacture and sell, and to furnish such quan-

tities of gas or water as may be required in the city, town or village where located, for public and private buildings, or for other purposes; and such corporation shall have power to lay conductors, for conducting water or gas through the streets, lands, alleys and squares, in such city, town or village, with the consent of the municipal authorities of said city, town or village, and under such reasonable regulations as they may prescribe." (For analogous sections, see R. S. 3550, G. C. 9320.)

CORPORATIONS MAY CONTRACT FOR GAS OR WATER

"Sec. LIV. The municipal authorities of any city, town or village, in which any gas light or water company shall be organized under this act, are hereby authorized to contract with any such corporation, for the lighting or supplying with water, the streets, lands, lanes, squares and public places in any such city, town or village."

The first Ohio statute relating expressly to street railway easements was passed April 10, 1861. It provided in part as follows:

**Act of April 10, 1861, 58 O. L. 66**

"AN ACT

To provide for and regulate street railroad companies.

THE CERTIFICATE OF ASSOCIATION

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that any number of natural persons, not less than five, associating to form a company for the purpose of constructing a street railroad, and become incorporated under this act, shall, under their hands and seals, make a certificate, which shall specify as follows: 1.

The name assumed by such company, and by which it shall be known. 2. The name of the street, alley, or avenue, with a description of the locality thereon of each terminus of said road, and the names of the streets, alleys, and avenues or other public grounds, through which such road shall pass. 3. The amount of capital stock necessary to construct such road. Such certificate shall be acknowledged before a justice of the peace, and certified by the clerk of the court of common pleas, and shall be forwarded to the secretary of state, who shall record and carefully preserve the same in his office; and a copy thereof, duly certified by the secretary of state, under the great seal of the state of Ohio, shall be evidence of the existence of such company.

GENERAL GRANT OF POWERS

"Sec. 2. That when the foregoing provisions have been complied with, the persons named as corporators in said certificate, and their associates, successors and assigns, by the name and style provided in said certificate, shall thereafter be deemed a body corporate with succession, with power to sue and be sued, plead and be impleaded, defend and be defended, contract and be contracted with, acquire and convey at pleasure all such real and personal estate as may be necessary and convenient to carry into effect the objects named in said certificate, in accordance with the provisions of this act; to make and use a common seal, and the same to renew or alter at pleasure—and do all needful acts to carry into effect the object of the incorporation. Such corporation shall be authorized to construct, operate and maintain a street railroad, with single or double track on the streets, alleys, or avenues, or other public ground specified in the certificate, with such sidetracks, turn-outs, offices, buildings and depots as they may deem necessary, between the points of

termini named in the certificate, and transport thereon passengers and their packages and baggage.

"* * *

CONSENT OF CORPORATE AUTHORITIES OF CITY TO BE OBTAINED

"Sec. 5. That hereafter, no street railroad shall be constructed or commenced until the consent of the city council or corporate authorities of the city, town or village wherein such road is to be constructed shall have been first obtained; and it shall be competent for the city council or corporate authorities of any city, town or village, to agree with any street railroad company, organized in pursuance of this act, or with any individual or company of individuals, desiring to construct a street railroad in such city, town or village, upon the manner and upon the terms and conditions upon which such corporation, individual or company of individuals, shall construct and operate a street railroad in such city, town or village: Provided, that no grant to occupy any street, lane or avenue, or public ground in any city of the first class, containing a population exceeding eighty thousand inhabitants, shall be made, except in accordance with sections fifteen and sixteen of an act passed March 3, 1860, relating to cities of the first class, having a population exceeding eighty thousand inhabitants.

"* * *"

The above act, slightly changed, became *R. S., Sections* 3437-3443 (see *G. C.* 9100-9113.)

## Act of March 31, 1865, 62 O. L. 72

"AN ACT

Supplementary to the act entitled 'an act to provide for the creation and regulation of incorporated companies in the state of Ohio,' passed May 1, 1852.

SURVEYS AND APPROPRIATION OF TELEGRAPH LINES

"Section I." (R. S. 3456, 3457.) "*Be it enacted by the General Assembly of the State of Ohio,* That any magnetic telegraph company heretofore incorporated, or that may hereafter be incorporated, under any law of this state, is authorized to enter upon any land, whether held by any individual, or by any corporation, and whether acquired by purchase or by an appropriation thereof in virtue of any law of this state, or in virtue of any provision in the charter of such corporation, for the purpose of making preliminary examinations and surveys, with a view to the location and erection of lines of magnetic telegraph; and may appropriate so much of such land as may be deemed necessary for the erection and maintenace of its telegraph poles, piers, abutments, wires, and other necessary fixtures, and for stations, and for the right of way over said lands and adjacent lands, sufficient to enable said magnetic telegraph company to construct and repair said lines of magnetic telegraph. No magnetic telegraph company incorporated under any law of this state, shall be authorized, without the consent of the owner in writing, to enter any dwelling, warehouse, barn, or any building connected with either of them, or any other edifice erected for any agricultural, commercial, manufacturing, religious, educational, or scientific purpose, or any railroad depot, station, tool-house, engine-house, or warehouse, or to use or appropriate any part

thereof; nor to erect any telegraph pole, pier, or abutement in any yard, or inclosure within which any such edifice may be situated, nor, in cases not provided for in section five of this act, to erect any telegraph pole, pier, abutment, wires, or other fixtures, so near to any such edifice as to occasion injury thereto, or risk of injury, in case such pole, pier, or abutment should be overthrown; nor shall such company be authorized to injure or destroy any fruit or ornamental trees." (For present analogous section see G. C. 9172, 9173.)

SAME

"Sec. II." (R. S. 3458.) "Where the lands sought to be appropriated for lines of magnetic telegraph are held by any railroad, turnpike, canal, bridge, or avenue company, or by any other corporation, incorporated under any law of this state, whether held by purchase or in virtue of any appropriation authorized by their charter, or by any law of this state, the right of the magnetic telegraph company to appropriate such lands shall be limited to such use of the same as shall not, in any material degree, interfere with the practical uses to which such corporations may be authorized to put such lands, under their respective charters; nor shall any magnetic telegraph company be authorized to erect their poles, piers, abutments, wires, and other necessary fixtures in such close proximity to any other line of magnetic telegraph, authorized by law to be constructed, as to interfere mechanically with the practical working of such telegraph." (For present analogous section see G. C. 9174.)

SAME

"Sec. III." (R. S. 3459.) "The right of the magnetic telegraph company to use lands held by any railroad company, for the permanent struc-

tures of the telegraph, shall be limited to the land which lies within five feet of the outer limits of the right of way of such railroad company, wherever it is practical to erect the line within those limits. The statement, in all cases where the applicants seek to appropriate lands that lie beyond those limits, shall state the facts showing such impracticability, and shall designate, either by a survey and map, or by reference to monuments, or by other means of easy identification, the exact spot where such magnetic telegraph company seeks to establish the line; and the probate court shall, in all instances, determine, if it is controverted by the railroad company, whether the erection of the line at the points designated will, in any material degree, interfere with the practical uses to which such railroad may be authorized to put such land; and if the court shall be satisfied that it will so interfere, they shall reject the application, or require the structure to be erected at such other point as the court shall direct; provided, that nothing in this act shall be so construed as to authorize any telegraph company to condemn the use of the track or rolling stock of any road, for the purpose of transporting poles, materials, or employees of such telegraph company, or for any other purpose whatever." (For present analogous sections see G. C. 9175, 9176.)

SAME

"Sec. IV." (R. S. 3460.) "Proceedings to appropriate lands to the use of any magnetic telegraph company instituted under the act to provide compensation to owners of private property, appropriated to the use of corporations, passed April 30, 1852, against any defendant whose adjoining or continuous lands lie in more than one county, may be instituted in any county in which any part of said lands may lie, and the damages shall be assessed, in one proceeding, in respect of all such

lands of the defendant sought to be appropriated, whether lying in the county wherein the court is sitting or in other counties." (For present analogous section see G. C. 9177.)

### How Telegraph May Be Constructed Through Any City or Village

"Sec. V." (R. S. 3461.) "When any lands authorized by this act, and the act to which this is supplementary, to be appropriated to the use of any magnetic telegraph company, are subject to the easement of any street, alley, public way, or other like public use, within the limits of any city or incorporated village, the mode of use shall be such as shall be agreed upon between the municipal authorities of such city or incorporated village and the magnetic telegraph company, and in case they can not agree, or in case the municipal authorities unreasonably delay to enter into any agreement, then the probate court of the proper county, in a proceeding instituted for that purpose, shall direct in what mode such magnetic telegraph line shall be constructed along such street, alley, or public way, so as not to incommode the public in the use of such street, alley, and public way. Nothing in this section shall be so construed as to authorize any municipal corporation to demand or receive any compensation for the use of any street, alley, or public way, beyond what may be necessary to restore the pavement to its former state of usefulness." (For present analogous sections see G. C. 9178, 9179.)

### Who May Construct or Own Lines

"Sec. VI." (R. S. 3455.) "Any magnetic telegraph company incorporated under the laws of this state, may construct, own, use and maintain any line or lines of magnetic telegraph, whether described in their original certificate of organization

or not, and whether such line or lines be wholly within, or partly beyond the limits of this state, or may join with any other corporation or association in conducting, leasing, owning, using or maintaining such line or lines, upon such terms as may be agreed upon between the directors or managers of the respective corporations, and such magnetic telegraph companies may own and hold any interest in such line or lines, or may become lessees of such line or lines, upon such terms as may be agreed on." (For present analogous section see G. C. 9171.)

PENALTY FOR DESTROYING POSTS, PIERS, ETC.

"Sec. VII. Any person who shall unlawfully and intentionally injure, molest, or destroy any of the lines, posts, piers, abutments, or other material or property pertaining to any line of magnetic telegraph, erected in this state, shall upon indictment in the Court of Common Pleas of the proper county, and on conviction thereof, be deemed guilty of a misdemeanor, and be punished by fine not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding one year, or both, at the discretion of the court having cognizance thereof.

DUTY OF COMPANY IN SENDING DISPATCHES

"Sec. VIII." (R. S. 3462, 3463, 3464.) "It shall be the duty of every telegraph company, incorporated or unincorporated, operating any telegraph line in this state, to receive dispatches from and for other telegraph lines not being parallel to or doing business in competition with the line over which the dispatch is required to be sent, and from or for any individual, and on payment of their usual charges for transmitting dispatches as established by the rules and regulations of such telegraph line, to transmit the same with impar-

tiality and good faith under a penalty of one hundred dollars for every neglect or refusal so to do, to be recovered with costs of suit by civil action, in the name and for the benefit of the person or persons or company, sending or desiring to send such dispatch. Where the person sending the dispatch desires to have it forwarded over the lines of other telegraph companies, whose termini are respectively within the limits of the usual delivery of such companies, to the place of final destination, and shall tender to the first company the amount of the usual charges for the dispatch to the place of final delivery, it shall be the duty of the company to receive the same, and, without delaying the dispatch, to pay to the succeeding line the necessary charges for the remaining distance; and it shall be the duty of the succeeding line or lines to accept the same, and forward the dispatch in the same manner as if the sender had applied to them in person, and paid them their usual charges; and for omitting so to do, they shall severally be liable to a like penalty. In all cases where application is made to any such telegraph company to send a dispatch, it shall be the duty of the officer, agent, clerk or servant, appointed by such company to receive dispatches at that station, plainly to inform the applicant, and if required by him to write upon the dispatch that the line is not in working order, or that the dispatches already on hand for transmission will occupy the time so that the dispatch offered can not be transmitted within the time required if the facts are so; and for omitting to do so, or for intentionally giving false information to the applicant in relation to the time within which the dispatch offered may be sent, such officer, clerk, agent or servant, and the company by which he is employed shall incur the same penalty." (For present analogous section see G. C. 9182-9184.)

NEWSPAPERS AND PUBLIC OFFICERS TO HAVE THE PREFERENCE IN CERTAIN CASES

"Sec. IX." (R. S. 3465.) "It shall be the duty of every telegraph company, incorporated or unincorporated, operating any telegraph line in this state, to transmit and deliver all dispatches in the order in which they are received for transmission or delivery under the like penalty of one hundred dollars, as provided in Section Eight; provided, however, that arrangements may be made with the proprietors or publishers of newspapers for the transmission, for the purpose of publication, of intelligence of general and public interest, out of its regular order; and provided, also, that dispatches by public officers of the state, or the United States, on public business, may have preference over all private business when the public interest requires such preference; and, provided, also, that no such company shall be required to deliver dispatches at a greater distance from the station at which they are received than the published regulations of such company require the company to deliver them. If the applicant direct the dispatch to be mailed at the place of delivery, and offer to pay the necessary postage thereon, such telegraph company shall affix the necessary postage stamp, and mail the dispatch in time for the first mail that shall depart for the place of final destination, within a reasonable time after such dispatch shall have been received at the office of delivery; and for the omission so to do, such company shall be liable to a like penalty as provided in Section Eight." (For present analogous section, see G. C. 9185.)

PENALTY FOR DIVULGING CONTENTS OF DISPATCH

"Sec. X." (R. S. 3466.) "Any person connected with any telegraph company, incorporated or unincorporated, operating a line of telegraph in this state, either as manager, clerk, operator,

messenger, or in any other capacity, who shall wilfully divulge the contents, or the nature of the contents of any private communication intrusted to him for transmission or delivery, or who shall wilfully refuse or neglect to transmit or deliver the same, or shall wilfully delay the transmission or delivery of the same, with a view to injure the sender or intended receiver, or to benefit himself or any other person, shall, on conviction thereof in the Court of Common Pleas of the proper county, be adjudged guilty of a misdemeanor, and shall suffer imprisonment in the county jail for a term not exceeding three months, or shall pay a fine not exceeding five hundred dollars, in the discretion of the court." (For present analogous section, see G. C. 13388.)

PENALTY FOR TRANSMITTING FALSE INTELLIGENCE

"Sec. XI." (R. S. 3467.) "If any agent, officer, or manager of any telegraph line operating in this state, or any other person, shall knowingly transmit by such telegraph line any false communication or intelligence, with intent to injure any one, or to speculate in any article of merchandise, commerce or trade, or with intent that another may do so, or shall knowingly send or deliver any dispatch that is forged, or not authorized by the person whose name purports to be signed thereto, shall, on conviction thereof in the Court of Common Pleas of the proper county, be liable for the same penalty as is provided in Section Ten of this act." (For present analogous section, see G. C. 9186.)

COMPANY MAY REMOVE POLES, PIERS, ETC., AND APPROPRIATE OTHER LANDS, IN CERTAIN CASES

"Sec. XII." (R. S. 3468.) "If at any time, after the erection of any line of magnetic telegraph upon lands held by any corporation, such

corporation shall have occasion to use the land upon which any telegraph pole, pier, abutment, or other fixture, has been erected, by virtue of the power given in this act, for any of the purposes authorized by their charter, it shall be the duty of such telegraph company to remove such pole, pier, abutment, or fixture, to such convenient place as may be designated by the corporation requiring the use of the ground, upon reasonable notice given in writing, and to erect the pole, pier, abutment, or fixture, in such new place, so as not to interfere with the practical uses to which such corporation may be authorized to put such land. If it be impracticable to erect a line of magnetic telegraph upon the lands of such corporation, in consequence of the uses to which such corporation may put the lands, the telegraph company are hereby authorized to appropriate adjoining lands, by a new proceeding for that purpose." (For present analogous sections, see G. C. 9187, 9188.)

COMPANY MUST REPAIR DECAYED OR DEFECTIVE WORKS

"Sec. XIII." (R. S. 3469.) "If at any time, after the erection of such magnetic telegraph line, on the lands of any corporation, such corporation shall apprehend danger, or risk of danger, to the works or practical operations of such corporation, in consequence of any decay or defect in the mode of structure of any of the works of such magnetic telegraph company, they may require the telegraph company, upon five days' notice in writing, to repair such decayed or defective works; or, in case the danger is imminent, so as not to admit of delay, such corporation may, without notice, repair such defect and recover the expenses thereof, with costs of suit, before any court of competent jurisdiction." (For present analogous section, see G. C. 9189.)

"Sec. XIV. This act shall take effect from its passage."

Section XII of the Act of May 1, 1852, became Section 3283 of the Official Revised Statutes of 1880. Section XLVII of the Act of May 1, 1852, *supra*, became Section 3454 of the Revised Statutes of 1880. Sections I to XIII of the Act of March 31, 1865, *supra*, are found in Sections 3455 to 3469 of the Revised Statutes of 1880, with some change in the order.

The Revised Statutes of 1880 contain the following section relating to the use of streets by gas and water companies:

POWERS OF GAS AND WATER COMPANIES

"Sec. 3550. A company organized for the purpose of supplying gas for lighting the streets and public and private buildings of a city, village, town, or township, may manufacture, sell, and furnish the gas required therein for such or other purposes, and a company organized for the purpose of supplying the inhabitants of a city village, town, or township with water may sell and furnish any quantity of water required therein for such or other purposes; and such companies may lay conductors for conducting gas or water through the streets, lands, alleys, and squares in such city, village, town, or township, with the consent of the municipal authorities of the city, village, or town, or with the consent of the trustees of the township, and under such reasonable regulations as they may prescribe. (64 v. 255, Sec. 53.)"

## Act of May 12, 1886, 83 O. L. 143

"AN ACT

"To authorize the construction of lines for conducting electricity for light and power purposes and the contracting by municipalities for lighting streets, and other public places with electricity.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That a company organized for the purpose of supplying electricity for power purposes, and for lighting the streets and public and private buildings of a city, village or town, may manufacture, sell and furnish the electric light and power required therein for such and other purposes, and such companies may construct lines for conducting electricity for power and light purposes through the streets, alleys, lanes, lands, squares and public places of such city, village or town, by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires, with the consent of the municipal authorities of the city, village or town, and under such reasonable regulations as they may prescribe. Provided, that all wires erected and operated under the provisions of this act shall be covered with a waterproof insulation, and said poles, piers, abutments and wires shall be so located and arranged as not to interfere with the successful operation of existing telegraph and telephone wires.

"Section 2. The municipal authorities of any city, village or town, in which any electric light company is organized, may contract with any such company for lighting the streets, alleys, lands, lanes, squares and public places in such city, village or town.

"Section 3. This act shall take effect and be in force from and after its passage.

* * * * *

"Passed May 12, 1886."

(See G. C. 9195.)

## Act of January 26, 1887, 84 O. L. 7

"AN ACT

"To supplement sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio.

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* that the following section shall constitute a section supplementary to sections from 3454 to 3471, inclusive, of the Revised Statutes of Ohio, with sectional numbering as follows:

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies.

"Section 2. This act shall take effect and be in force from and after its passage.

"Passed January 26, 1887."

## Act of April 21, 1896, 92 O. L. 204

"AN ACT

"To amend section 3471a of the Revised Statutes of Ohio.

MAGNETIC TELEGRAPH COMPANIES

"Section 1. *Be it enacted by the General Assembly of the State of Ohio,* That section 3471a, as enacted January 26, 1887 (84 O. L. 7), be and the said section hereby is amended so as to read as follows:

## Laws Applicable to Electric Light and Power and Automatic Package Carrier Companies

### Municipal Consent; Penalty for Violation; Application of Act, Etc.

"Sec. 3471a. The provisions of this chapter, so far as the same may be applicable, except section three thousand four hundred and sixty-one, shall apply also to any company organized for the purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares and public places with electric light and power, or automatic package carrier; and every such company shall have the same powers, except those given by said section three thousand four hundred and sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies. Provided, however, that in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality; and this inhibition shall extend to all levels above and below the surface of any such public ways, grounds or places, as well as along the surface thereof; but this inhibition shall not be applicable to any rights which have heretofore been received and exercised through proceedings of any probate court. Any person or company violating any portion of the inhibition aforesaid shall be deemed guilty of a misdemeanor, and shall upon conviction thereof be fined in any sum not less than one hundred and not more than five hundred dollars. The means thus created for enforcing said inhibition shall be held to be only cumulative to any other lawful means open to the municipality by way of injunc-

tion or otherwise; and this act shall apply to actions and causes of action or proceeding named in section seventy-nine of the Revised Statutes, except such as may be pending on error, and not on appeal, in any circuit court of the state.

REPEALS, ETC.

"Section 2. That said section 3471a shall be and the same hereby is repealed; and this act shall take effect and be in force from and after its passage.

* * * * *

"Passed April 21, 1896."
(See G. C. 9192, 9193, 9194.)

## 2. Collections of Statutes Relating to the Powers of Municipalities Over Streets

In 1890 the following statutes relating to the powers of municipalities over their streets were in effect:

### R. S. Section 2640

COUNCIL TO HAVE CONTROL OF STREETS, ETC.

"Sec. 2640. The council shall have the care, supervision, and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance. (66 v. 222, Sec. 439.)"

### R. S. Section 1692

"Section 1692. In addition to the powers specifically granted in this title, and subject to the

exceptions and limitations in other parts of it, cities and villages shall have the general powers enumerated in this section, and the council may provide by ordinance for the exercise and enforcement of the same.

"* * *

STREETS

"18. To lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair, and to light streets, alleys, public grounds and buildings, wharves, landing places, bridges, and market spaces within the corporation, including any portion of any turnpike or plank road therein surrendered to or condemned by the corporation, and to provide for laying down gas pipes.

"* * *"

### 3. Collection of Statutes Relating to Control of Electric Light Companies by Municipalities

In 1890 the following statutes relating to control of electric light companies by municipalities were in effect:

#### R. S. Section 2478

REGULATING PRICE OF ELECTRIC LIGHT, ARTIFICIAL AND NATURAL GAS

"Sec. 2478. The council of any city or village in which electric lighting companies, natural or artificial gas companies, or gas light or coke companies may be established, or into which their wires, mains or pipes may be conducted, are hereby empowered to regulate, from time to time, the price which said electric lighting, natural or artificial gas, or gas and coke companies may charge for electric light or for gas for lighting or fuel purposes, furnished by such companies to the citizens, public grounds and buildings, streets, lanes,

alleys, avenues, wharves and landing places; and such electric lighting, natural or artificial gas, or gas-light and coke companies shall, in no event, charge more for any electric light, or natural or artificial gas furnished to such corporation or individuals than the price specified by ordinance of such council; and such council shall also have power to regulate and fix the price which such companies shall charge for rent of their meters. (March 1, 1889: 86 v. 63.)"

## R. S. Section 2491

CONTRACT TO SUPPLY MUNICIPALITY WITH ELECTRIC LIGHT OR GAS

"Sec. 2491. A municipal corporation may contract with such company for supplying with electric light, natural or artificial gas for the purpose of lighting (or heating) the streets, squares and other public places and buildings in the corporation limits; but this section shall be subject to the restrictions in the last clause of Section Thirty-five Hundred and Fifty-one. (March 1, 1889; 86 v. 63.)"

## R. S. Section 2492

PROVISION FOR LIGHTING STREETS, ETC.

"Section 2492. The council of any city or village may provide for lighting the streets, alleys, public grounds and buildings, wharves, landing places, bridges, railways, and market spaces within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation. (69 v. 47, Sec. 428; 72 v. 107, Sec. 199.)"

## 4. Provisions of General Code of Ohio Relating to Powers of Municipalities Over Streets

Among the provisions of the *General Code of Ohio* now in effect relating to the powers of municipalities over streets, are the following:

"Sec. 3616. **Powers of ordinance or resolution.** All municipal corporations shall have the general powers mentioned in this chapter, and council may provide by ordinance or resolution for the exercise and enforcement of them. (99 v. 5, Sec. 7; 96 v. 26, Sec. 8.)"

"Sec. 3629. **Establish and care for streets.** To lay off, establish, plat, grade, open, widen, narrow, straighten, extend, improve, keep in order and repair, light, clean and sprinkle, streets, alleys, public grounds, places and buildings, wharves, landings, docks, bridges, viaducts, and market places, within the corporation, including any portion of any turnpike or plank road therein, surrendered to or condemned by the corporation. (99 v. 7, Sec. 7r.)"

"Sec. 3637. **Erection of fences, signs; construction and repair of wires, poles, plants; licensing house movers, electrical contractors, plumbers, etc.** To regulate the erection of fences, billboards, signs and other structures, within the corporate limits, and to provide for the removal and repair of, insecure billboards, signs and other structures; to regulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity; to provide for the licensing of house movers, electrical contractors, plumbers, and sewer tappers and vault cleaners. (103 v. 93, 99 v. 6, Sec. 7m.)"

"Sec. 3714. **Council to have care, supervision and control.** Municipal corporations shall have

special power to regulate the use of the streets, to be exercised in the manner provided by law. The council shall have the care, supervision and control of public highways, streets, avenues, alleys, sidewalks, public grounds, bridges, aqueducts, and viaducts, within the corporation, and shall cause them to be kept open, in repair, and free from nuisance. (96 v. 26, Sec. 9; 96 v. 31, Sec. 28.)"

# APPENDIX B

## Opinions of Court of Appeals of Huron County, Ohio, and Supreme Court of Ohio in Quo Warranto Case

### 1. State, ex rel. Martin, vs. The Ohio Electric Power Co., 35 Ohio App. 481

*Municipal corporations—Written acceptance of ordinance granting partnership use of streets, unnecessary—Incorporation of public service company sufficient acceptance, when—Statutes granting electric companies street privileges contemplate incorporated companies only—Sections* 9170, 9178, 9179, 9191, 9192, 9193; *and* 9194, *General Code—Rights greater than given by ordinance cannot be claimed by assignee, when—Estoppel not created by use after franchise ordinance expired.*

1. Where ordinance of municipality granting partnership a franchise to furnish electricity was silent as to manner of acceptance thereof, but partnership thereafter installed the necessary equipment and furnished and distributed electricity in municipality until incorporation of company by members of partnership to take over and conduct its business, to which all of the partnership property was transferred, the corporation thereafter continuing to furnish and distribute electricity as had the partnership theretofore, formal acceptance of the ordinance was not necessary.

2. Statutes granting privileges in streets to electric companies did not contemplate partnerships or individuals, but only incorporated companies.

3. Electric company, as assignee of partnership, having relied solely on ordinance granting to partnership, its successors and assigns, use of streets for a definite period, could not after expiration thereof, claim to possess any greater rights than the ordinance gave.

4. The continued use by the defendant of the streets and the furnishing and distribution of electricity within the municipality, after the expiration of the franchise granted by the ordinance, without further acquiring the right to do so in the manner provided by law, did not create an estoppel against the municipality in favor of the defendant.

(Decided May 21, 1928.)

In *Quo Warranto.*

Mr. Edgar G. Martin, prosecuting attorney, M. G. Ray Craig and Mr. Charles Suhr, for plaintiff.

Messrs. Fauver & Fauver and Mr. W. R. Pruner, for defendant.

Lloyd, J. This is an action in *quo warranto,* whereby the plaintiff, the State of Ohio, on relation of Edgar G. Martin, prosecuting attorney of Huron County, seeks to oust the defendant, The Ohio Electric Power Company, from using the public streets, lanes, alleys, avenues, and other public places of the City of Norwalk for the erection and maintenance of poles, wires, guy wires, and electrical equipment for the distribution of electricity for heat, light and power purposes in said municipality.

The defendant is a corporation, incorporated in August, 1924, under the laws of Ohio, for the purpose, among others, of engaging in the business of operating power plants with the necessary appliances, equipment, etc., for furnishing and distributing electricity for pri-

vate and public consumption, and since 1922 has been furnishing electricity to such of the people of Norwalk as choose to become its customers.

In 1890 six men, of whom there is now but one resident survivor, formed a partnership under the name of the Norwalk Incandescent Light Company to furnish electricity in the City of Norwalk for commercial purposes. Thereafter, upon application of the partnership therefor, the City of Norwalk, by ordinance passed October 7, 1890, granted to it, its successors and assigns for the term of twenty years, "a right of way through, in and upon the streets, sidewalks and alleys and grounds of said city for the use and purpose of therein and thereon erecting and maintaining and using all necessary poles or posts of wood, iron, or other suitable material, and the necessary wires to successfully operate and use a system of incandescent lighting in said city."

That ordinance contains certain restrictive conditions as to the height and location of the poles, and provides that "this grant of way is not exclusive." It contained no provision or condition as to how or in what manner the grantee should indicate its acceptance thereof, but the necessary equipment was installed by the partnership, and it thereafter conducted its business of furnishing and distributing electricity in Norwalk until the incorporation in March, 1891, of The Incandescent Light & Power Company of Norwalk, Ohio, for the purpose of "furnishing to the citizens of Norwalk and vicinity electric lighting of both arc and incandescent, * * * electric * * * power and * * * electricity for heating, for profit." In our judgment this was in law an acceptance thereof, and a formal written acceptance under these circumstances was unnecessary.

The Incandescent Light & Power Company of Norwalk, Ohio, was incorporated by the members of the partnership and one or two others, and upon its incorporation the partnership transferred to it all of the partnership property, and it proceeded to use the plant and equipment of the partnership to furnish electricity for lighting and commercial purposes in Norwalk. It continued so to do until February, 1893, when it filed in the Probate Court of Huron County a general deed of assignment for the benefit of creditors. By this deed it conveyed and assigned to the assignees named therein "all of its property of every nature and kind whatsoever." By a deed of the assignees, pursuant to an order of sale issued by the Court of Common Pleas, to which an appeal had been taken from the Probate Court, all of the property, including "all franchises, patronage and good will and rights of said business," of The Incandescent Light & Power Company, was conveyed and transferred on March 7, 1895, to George F. Jones and Mayme C. Foster, their heirs and assigns, who by deed dated May 20, 1895, by similar description, conveyed the property so acquired by them to The Northern Electric Company, "its successors, heirs and assigns." Thereafter, on May 8, 1900, the grantee corporation conveyed this property by like description to The Norwalk Gas & Electric Company, its successors and assigns. On July 16, 1895, the City of Norwalk entered into a contract with The Northern Electric Company for lighting the streets, alleys, etc., of the city for a period of ten years from September 1, 1895, which contract, by consent of the city, was assigned to The Northern Gas & Electric Company, and by the latter company, with consent of the city, assigned to The Cleve-

land Southwestern Traction Company; and on April 13, 1905, a second contract for street lighting for a period of ten years from September 1, 1905, was entered into by the city with The Cleveland Southwestern Traction Company.

The Norwalk Gas & Electric Company owned and operated the property and business until February 14, 1903, when it conveyed and transferred all of its property, franchise rights, and privileges to The Cleveland Southwestern Traction Company, its successors and assigns, by which company the property so described was conveyed and transferred to The Cleveland, Southwestern & Columbus Railway Company, which in turn, on March 1, 1924, conveyed and transferred it to The Cleveland Southwestern Railway & Light Company. On December 31, 1924, the last above named company, with the consent of the Public Utilities Commission of Ohio, transferred by bill of sale to one Victor Emanuel, by specific description, certain tangible personal property in Norwalk and "all distributing power and light systems, transformers, meters, services and the equipment and appurtenances thereto or in connection therewith of the grantor within the corporate limits of the City of Norwalk, Ohio, including approximately 8.3 miles of lines on poles of the grantor, approximately 5.2 miles of lines on poles of others than the grantor, and approximately 4.3 miles of lines on poles owned jointly by the grantor and others, together with all right, title and interest of the grantor in and to the poles so occupied jointly."

On May 22, 1925, Victor Emanuel executed to the defendant, The Ohio Electric Power Company, a bill of sale for the above property in the identical language and

form of the conveyance to him from The Cleveland Southwestern Railway & Light Company. Also on December 31, 1924, The Cleveland Southwestern Railway & Light Company conveyed to said Emanuel "all such right and title as it has or ought to have in the following described premises"—describing certain rights of way and other personal property—and "all right, title and interest of the grantor in and to any rights of way for a pole line, pole line rights, pole lines, poles and any licenses, franchises, easements or grants for said purposes possessed or enjoyed by the grantor in the City of Norwalk, Ohio, and/or used in connection with the distribution of power, light and heat by the grantor in said city."

On May 22, 1925, Victor Emanuel, in consideration of $10 and other good and valuable considerations, sold, assigned, and quit-claimed to The Ohio Electric Power Company, its successors and assigns, certain specifically described property, and all contracts, franchises, grants, rights and privileges in the City of Norwalk acquired from The Cleveland Southwestern Railway & Light Company.

The relator contends that the defendant has no right to occupy the streets, alleys, and public places in the City of Norwalk with its poles, wires, etc., for the distribution of electricity therein, for the reason that the franchise granted by the municipality to the partnership, the Norwalk Incandescent Light Company, expired by limitation on October 7, 1910, and, the city not having thereafter consented to such use and occupation of its streets and other public places, the rights and privileges, so granted, thereupon ceased. The defendant claims,

first, that by legislative enactment passed January 26, 1887, and operative until April 21, 1896, when it was materially changed by amendments, its predecessors in the right to occupy the streets and public ways and places of Norwalk obtained such privilege and authority directly from the state, and that, as the successor to them by conveyance and assignment, it now possesses the rights and privileges so acquired; and, second, that the City of Norwalk, having permitted defendant and its predecessors in title to continue to so occupy its streets and public places and furnish commercial and private lighting in the municipality, is now estopped to deny the right of respondent to so conduct its business in Norwalk and to occupy the streets and public places thereof for such purposes.

Chapter 2, Subdivision 2, Division 2, Title IX of Part II of the General Code, relates to telegraph and telephone companies, and Section 9170 thereof, formerly Section 3454, Revised Statutes, provides that "A magnetic telegraph company may construct telegraph lines, from point to point, along and upon any public road by the erection of the necessary fixtures, including posts, piers and abutments necessary for the wires; but shall not incommode the public in the use thereof."

Section 3471, Revised Statutes, now Section 9191, General Code, made the provisions of this chapter applicable also to telephone companies.

Section 3471a, Revised Statutes, now Sections 9192, 9193 and 9194, General Code, as originally enacted January 26, 1887, 84 Ohio Laws 7, provided: "The provisions of this chapter, so far as the same may be applicable, shall apply also to any company organized for the

purpose of supplying the public and private buildings, manufacturing establishments, streets, alleys, lanes, lands, squares, and public places with electric light and power, and every such company shall have the same powers and be subject to the same restrictions as are herein prescribed for magnetic telegraph companies."

This statute continued in force until April 21, 1896, when it was amended, 92 Ohio Laws 204, and as amended provided that "every such company shall have the same powers, except those given by said Section Three Thousand Four Hundred and Sixty-one, and be subject to the same restrictions, as are herein prescribed for magnetic telegraph companies," and that, "in order to subject the same to municipal control alone, no person or company shall place, string, construct or maintain any line, wire fixture or appliance of any kind for conducting electricity for lighting, heating or power purposes through any street, alley, lane, square, place or land of any city, village or town, without the consent of such municipality."

Section 3461, Revised Statutes, now Sections 9178 and 9179, General Code, relates to appropriation proceedings by telegraph companies, and by enactment of Section 3471a, Revised Statutes (Section 9192, General Code), became applicable to electric light and power companies. This section (Section 3461, Revised Statutes) provides in substance that the "mode of use" by any such company of the streets, alleys, etc., of any city or village, shall be such as shall be agreed upon by the municipal authorities thereof and the company, and, if they are unable to agree, the Probate Court in proceedings brought therein shall direct in what mode such line shall be constructed along such streets, alleys, etc. It is

apparent, therefore, that on October 7, 1890, when the ordinance was passed by the City of Norwalk granting to the partnership, the Norwalk Incandescent Light Company, its successors and assigns, the right to occupy the streets and public places of the city for the purposes therein stated, and thereafter, until April 21, 1896, when Section 3471a was amended (92 Ohio Laws, 204), neither a partnership nor any other person or company engaged in a like business was privileged to occupy the streets, alleys, etc., of any municipality in Ohio without either an agreement with the municipality or an order of the Probate Court directing the mode of such occupancy. It seems to us that neither a partnership nor an individual was contemplated by or designated in these statutory provisions. Their context seems clearly to indicate that the privileges thereby granted by the state applied only to incorporated companies. If this conclusion is correct, then not only the right to use, but the mode of use, could have been acquired by the partnership not otherwise than with the consent of the municipality expressed in an ordinance conferring those privileges. This the City of Norwalk did by the ordinance of October 7, 1890, limiting therein the right to use and the mode of use to twenty years from that date. The partnership, therefore, and its successive assignees, acquired the right to occupy the streets, alleys, etc., of Norwalk from the city and not from the state. Surely an electric light and power company upon which the state has conferred certain rights, conditional upon compliance with the legislative enactments creating them, may not as an assignee of a partnership or an individual acquire the rights so granted in derogation of the authority conferring them.

Any of the corporate assignees of the partnership could at any time have sought to agree with the municipal authorities as to the mode of use of the streets, alleys, etc., of the city in the exercise of their corporate functions and authority; and, if agreement between them was not possible, might have instituted proceedings in the Probate Court of Huron County to effect this purpose. The Northern Electric Company which last occupied the streets, etc., of Norwalk, prior to April 21, 1896, when Section 3471a, Revised Statutes, was amended, might have so proceeded at the expiration of the time fixed in the ordinance. Not having done so, and having relied solely upon the ordinance, with its restrictive terms and conditions, until the time within which the proceedings authorized by Section 3461, Revised Statutes, might have been invoked had elapsed, we are of the opinion that the respondent cannot now claim to be possessed of any greater rights than the ordinance gave. If the partnership were held to be such a company as was included within the purview of Sections 3454 and 3471a, Revised Statutes, then its right to occupy the streets of Norwalk was conditioned upon its agreeing with the municipal authorities as to the mode of use; or, failing so to agree, upon the direction of the Probate Court of the county as to the mode of use, in a proceeding instituted for that purpose; and such agreement or direction is inseparable from such right, and such right terminates with such agreement or direction.

State, ex rel., vs. Central Union Telephone Co., 11 C. C. 55, 5 C. D. 311.

The views we have here expressed and the conclusion at which we have arrived are not in conflict with the decision of the United States Supreme Court in *Ohio Public Service Co. vs. Ohio ex rel. Fritz*, 274 U. S. 12, 47 S. Ct. 480, 71 L. Ed. 898, for the reason that the franchise there involved was for an unlimited time. Being of the opinion also that the doctrine of estoppel has no application to the facts here presented, we conclude that the prayer of the relator should be granted.

Judgment accordingly.

Richards and Williams, JJ., concur.

## 2. Ohio Electric Power Co. vs. The State, ex rel. Martin, 121 O. S. 235

*Municipal corporations—Twenty-year electric light franchise granted in* 1890 (84 O. L. 7)*—Perpetual right to occupy streets not acquired from state, when—Nor by acquiescence or non-action of public officials or through estoppel.*

(No. 21302—Decided June 12, 1929.)

Error to the Court of Appeals of Huron County.

Messrs. Fauver & Fauver, and Mr. W. R. Pruner, for plaintiff in error.

Mr. Edgar G. Martin, Mr. G. Ray Craig, and Mr. Charles Suhr, city solicitor, for defendant in error.

By the Court: This is an action in *quo warranto*, originating in the Court of Appeals of Huron County, wherein is challenged the right of the defendant, the Ohio Electric Power Company, to maintain its poles,

wires, and electrical equipment in the streets, alleys, and public places in the City of Norwalk for the purpose of distributing and supplying electric current for commercial and private lighting, and plaintiff prays an order ousting the defendant therefrom. The Court of Appeals on hearing found for the plaintiff and ordered a decree of ouster as prayed for in the petition. Thereupon a petition in error was filed in this court.

The rights of the respective parties may readily be ascertained from a consideration of the facts disclosed by the record. The defendant, the Ohio Electric Power Company, became the owner of the property concerned, and of certain rights, privileges, and franchises, by successive grants from the Northern Electric Company, a corporation formed April 30, 1895. Shortly after its incorporation, to-wit, May 20, 1895, the Northern Electric Company procured a transfer to itself of the property, including all rights and franchises, theretofore belonging to the Incandescent Light & Power Company, a corporation organized March 7, 1891, and had acquired a 20-year franchise, which in 1890 had been granted to the Norwalk Incandescent Light Company, a partnership. The grant by the municipality to the partnership, which thereafter incorporated and became the Incandescent Light & Power Company, was for a stipulated and expressly limited term of 20 years, and granted a right of way upon the streets, alleys, and public grounds of said city for the purpose of therein erecting and maintaining necessary poles and wires to provide and successfully operate a system of incandescent lighting. No written acceptance was provided for, nor shown in the record, but it does appear that the ordinance was enacted upon

the application of the partnership, members of which attended the meeting of council and personally accepted the grant, and thereupon the grantees entered upon, and thereafter the company which took over the property of the partnership continued to operate, the plant and lines constituting the only lighting system then existing in the City of Norwalk. Said company was incorporated in March, 1891, its purpose being the furnishing to the citizens of Norwalk and vicinity electric current for lighting, power and heating. Later, through an assignee for creditors, and by order of court, all the property of said company, including "all franchises, patronage, good will and rights of said business," were sold and transferred to certain individuals named, who, in May, 1895, by conveyance of similar purport and description, transferred the same to the Northern Electric Company. By like description the same property was on May 8, 1900, conveyed to the Norwalk Gas & Electric Company, which had been organized and incorporated under the laws of Ohio April 17, 1900.

Thereupon the council of the City of Norwalk consented to an assignment of a 10-year contract for street lighting to the last named company, which contract had been entered into by the city and the Northern Electric Company in July, 1895. By a similar description said property was transferred to the Cleveland & Southern Traction Company in February, 1903. In April, 1905, the latter company entered into a contract with the City of Norwalk for street lighting in anticipation of the expiration of the former contract, no reference being made therein to commercial lighting; but the contract did provide for the erection and maintenance of poles, etc., un-

der the "restrictions and limitations imposed by said city," and contained the express provision that "nothing herein contained shall permit said use or occupation of said streets, alleys, and other public places after the expiration of this contract, to-wit, August 31, 1915." That contract further provided as follows: "The said contractor, at the expiration of this contract, shall, upon request of the said city, remove all poles, posts, lamps, wires and other apparatus or material of every kind and description from the streets, alleys and other public places in said city, and restore said streets, alleys and other public places to as good a condition as the same may be at the time of such removal, and in default thereof after 30 days' notice from said city, the same may be done by said city or its agents, and said contractor shall pay to said city all costs and expenses thereby incurred."

It is to be observed that no franchise was given for electric light or power purposes, or grant of any character made by the council of the City of Norwalk, subsequent to the 20-year franchise, and that franchise by its express terms expired in 1910, and no contract of any kind or character relative to the furnishing and distribution of electric current, except street lighting contracts above referred to, was entered into by and between the city and either of said companies. The defendant in this action acquired whatever property and rights it has, which are involved herein, by successive grants from the Cleveland & Southern Traction Company.

This record discloses that the City of Norwalk erected a municipal plant in 1915, and constructed, and has since maintained and operated, a complete system, whereby it supplies current for all its street lighting and

also meets the demand for most of the current consumed for private and commercial use in the city.

Under the facts presented by the record the claim of the defendant that by reason of the occupancy of the streets of the City of Norwalk its predecessor obtained a perpetual right to occupy said streets, to which right this defendant has succeeded, cannot be sustained. Under the law as it stood in 1890, when such 20-year franchise was granted, the partnership could not have acquired such right otherwise than through the municipality itself. Authority was conferred only upon incorporated companies designated by statute to so occupy the streets of a municipality, and then only by conforming to the method of procedure prescribed by statute. Concededly no franchise was ever granted, and no agreement with reference to the use and occupancy of the streets ever entered into, except as hereinbefore stated, and no application was made to or action taken by the Probate Court under the statute.

The cases dealing with unlimited franchise grants have no application here. The companies which successively acquired the property and rights of the grantee of the 20-year franchise necessarily accepted the burdens as well as the benefits of that franchise. They could not take the grant free from the limitations expressly imposed. That franchise by its own terms expired in 1910, and every right of the predecessor of the defendant to occupy said streets, or any part thereof, ceased on August 31, 1915, under the clear and express terms of its contract above recited, and it could not thereafter convey something which it no longer possessed.

Mere acquiescence in the continued unauthorized occupancy of the streets, or non-action on the part of public officials to prevent obstruction, or delay in bringing action to procure an order of ouster, could not serve to confer any right upon the defendant company or estop the city from maintaining this proceeding.

Judgment affirmed.

Marshall, C. J., Robinson, Jones, Matthias, Day and Allen, JJ., concur.

Kincaid J., not participating.

